CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 327

A. F. RAWLINGS, RECEIVER OF THE LEE COUNTY NATIONAL BANK, MARIANNA, ARKANSAS, PETITIONER,

vs.

MRS. ELLA M. RAY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 12, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF ARKANSAS

No. H-8. At Law

E. B. FUTRALL, Receiver of the Lee County National Bank, Plaintiff,

vs.

MRS. ELLA M. RAY, Defendant

COMPLAINT—Filed December 7, 1938

Comes E. B. Futrall, as Receiver of the Lee County National Bank, by his attorney, John C. Sheffield, and states:

That heretofore on or about March 6, 1933, the Lee County National Bank of Marianna, Arkansas, being then and there a banking corporation duly organized and existing under the banking laws of the United States of America, and having its office and principal place of business in the city of Marianna, Lee County, Arkansas, was suspended, and subsequently, declared insolvent by the Comptroller of the Currency of the United States. That on May 1, 1934, the Comptroller of the Currency in accordance with the provisions of the Act of Congress of June 30, 1876, "An Act authorizing the Appointment of Receivers of National Banks, and for other purposes," did appoint A. F. Callaway as Receiver of said banking institution; the said A. F. Callaway being subsequently succeeded by E. B. Futrall, who is now the duly appointed, qualified and acting Receiver of said Lee County National Bank and has taken possession of all the assets thereof.

That on the date of the said suspension of the said Lee County National Bank, the said defendant was the owner of 26⅔ shares of capital stock of said banking corporation, of the par value of $100.00 per share, which said capital stock was issued to her as follows, to-wit:

Certificate No. ..... for ..... shares, dated ....., that on

[fol. 2] July 6, 1934, the said Comptroller of the Currency of the United States determined that it was necessary to levy an assessment of fifty per cent against each of the

stockholders of said corporation for each share held by each of them, and to enforce such liability, did on said date, levy such assessment to the extent of fifty per cent to be paid by each of said stockholders on each share held by each of them, on or before the said suspension of said bank and did then make a demand on the defendant and on each and all of the stockholders of said corporation to pay the same on or before August 13, 1934, after which time, the said amount would bear interest at the rate of six per cent per annum and did then and there direct, and has since directed the plaintiff, as such Receiver to take all the necessary proceedings, by suit or otherwise, to enforce said stock assessment. A copy of said assessment and demand is attached hereto.

That on November 6, 1935, the said Comptroller of the Currency of the United States determined that it was necessary to levy an assessment of fifty per cent against each of the stockholders of said corporation for each share held by each of them on or before the said suspension of said bank and did then make a demand on the defendant, and on each and all the stockholders of said corporation, to pay the same on or before December 13, 1935, after which time the said amount should bear interest at the rate of six per cent per annum and did then and there direct and has since directed the plaintiff, as such receiver to take all the necessary proceedings, by suit or otherwise, to enforce said stock assessment. A copy of said assessment and demand is attached hereto.

By virtue of such assessment and order and the Acts of Congress in such cases made and provided, the defendant, Ella M. Ray, became indebted to this plaintiff in the sum of $2666.66, together with interest at the rate of six per cent per annum on the amount of $1,333.33 from August 13, 1934, until paid, and interest at the rate of six per cent per annum on the amount of $1,333.33, from December 13, 1935, until paid, no part of which has been paid or collected, and that said defendant is now justly indebted to plaintiff in the aforesaid sum.

[fol. 3] Wherefore: plaintiff, E. B. Futrall, Receiver of the said Lee County National Bank of Marianna, Arkansas, insolvent, prays that he may have judgment against the defendant, Ella M. Ray, in the sum of $2,666.66, together with interest at the rate of six per cent per annum on the amount of $1,333.33 from August 13, 1934, and also interest

at the rate of six per cent per annum on the amount of $1,333.33 from December 13, 1935, together with all his costs in this action expended, and for all other proper general and equitable relief.

John C. Sheffield, Attorney for plaintiff.

WAIVER OF SERVICE AND ENTRY OF APPEARANCE BY DEFENDANT

Jesse B. Daggett, duly sworn on oath, deposes and states:

I am the attorney for Mrs. Ella M. Ray, and I am duly authorized to waive the service and enter the appearance of the said Mrs. Ella M. Ray, and I do by this instrument waive the service and enter the appearance of the said defendant.

Jesse B. Daggett.

Subscribed and sworn to before me, a Notary Public, on this 2nd day of December, 1938. Cloreece Wilmet, Notary Public. My commission expires: Sept. 2, 1941. (Notarial Seal.)

NOTICE OF ASSESSMENT

Office of the Receiver

The Lee County National Bank of Marianna, Arkansas, Marianna, Arkansas

Marianna, Ark., July 9, 1934.

You Will Please Take Notice, That the Comptroller of Currency has on July 6, 1934, levied an assessment upon the shareholders of The Lee County National Bank of Marianna, Marianna, Ark., on the par value of each and every share, payable at the office of the Receiver, on or before the 13th day of August, 1934.

The Receiver is, however, authorized by the Comptroller to grant an extension without interest to shareholders who [fol. 4] pay 25 per centum of the assessment on or before that date, and who will give a written obligation, satisfactorily guaranteed, to pay 25 per centum additional, on or before September 13, 1934; 25 per centum additional on or

before October 13, 1934; and the remaining 25 per centum on or before November 13, 1934.

Deferred Payments will bear interest after August 13, 1934, at the legal rate in the State of Arkansas, except that the interest may be abated in the case of any shareholder who pays one-fourth of his assessment on or before August 13, 1934, and who pays the remaining installments on or before the dates at which they mature under the terms of this extension.

You are therefore required to pay the assessment of Fifty (50) per centum on the par value of 26⅔ shares of stock standing in your name in accordance with the foregoing order and this notice. Your prompt compliance will be of great benefit to the creditors of this trust and advance materially its liquidation.

A. F. Callaway, Receiver, The Lee County National Bank, of Marianna, Marianna, Arkansas.

To Ella M. Ray, 515 N. McClain, Memphis, Tennessee.

Note—Make all checks payable to the order of A. F. Callaway, Receiver.

(See Inside)

ASSESSMENT UPON SHAREHOLDERS

Treasury Department

Office of The Comptroller of Currency

No. 10854

In the Matter of The Lee County National Bank of Marianna, Marianna, Arkansas

Washington, D. C., July 6, 1934.

[fol. 5] To All Whom It May Concern:

Whereas, upon a proper accounting by the receiver heretofore appointed to collect the assets of The Lee County National Bank Of Marianna, Marianna, Arkansas, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the

individual liability of the stockholders therefore to the extent hereinafter mentioned as prescribed by Section 5151 and 5234 of the Revised Statutes of the United States, Section 1c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913 known as Federal Reserve Act.

Now, Therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The Lee County National Bank of Marianna", for Forty Thousand ($40,000.00) dollars, to be paid by them on or before the 13th day of August, 1934, and I hereby make demand on each and every one of them for fifty per cent of the par value of each and every share of the capital stock of said association held or owned by them, respectively at the time of its failure; and I hereby direct A. F. Callaway, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the shareholders.

In Witness Whereof I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this 6th day of July, A. D. 1934.

J. F. T. O'Connor, Comptroller of the Currency.
(Seal.)

NOTICE OF ADDITIONAL ASSESSMENT

File Number 2883

Office of the Receiver

The Lee County National Bank of Marianna, Arkansas

Marianna, Arkansas,
November 6, 1935.

You Will Please Take Notice, That the Comptroller of the Currency has on November 6, 1935 levied an additional [fol. 6] assessment upon the shareholders of the Lee County National Bank of Marianna, Arkansas of fifty per cent of the par value of each and every share payable at the office of the Receiver, on or before December 13, 1935.

The Receiver is, however, authorized by the Comptroller to grant an extension without interest to Shareholders who

pay 25 per centum of the assessment on or before that date, and who will give a written obligation, satisfactorily guaranteed, to pay 25 per centum additional on or before January 13, 1936, 25 per centum additional on or before February 13, 1936, and the remaining 25 per centum on or before March 13, 1936.

Deferred payments will bear interest after December 13, 1935 at the legal rate in the State of Arkansas, except that interest may be abated in the case of any shareholder who pays one fourth of his assessment on or before December 13, 1935, and who pays the remaining installments on or before the dates at which they mature under the terms of this extension.

You are therefore required to pay the assessment on the 26⅔ shares of stock standing in your name in accordance with the foregoing order and this notice. Your prompt compliance will be of great benefit to creditors of this trust and advance materially its liquidation.

A. F. Callaway, Receiver, The Lee County National Bank of Marianna, Arkansas.

To Ella M. Ray, 515 N. McClain, Memphis, Tennessee.

ASSESSMENT UPON SHAREHOLDERS

Treasury Department

Office of the Comptroller of the Currency,

Washington, D. C.

November 6, 1935.

No. 10854

In the Matter of The Lee County National Bank of Marianna, Arkansas

[fol. 7] To All Whom It May Concern:

Whereas, upon a proper accounting by the Receiver heretofore appointed to collect the assets of "The Lee County National Bank Of Marianna," Arkansas, and upon a valuation of the uncollected assets remaining in his hands on the Twenty-first day of June, 1934, it appeared to the satis-

faction of the Comptroller of the Currency that in order to pay the debts of such association it would be necessary to enforce the individual liability of the stockholders thereof to the extent of Forty Thousand Dollars, as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States; Section lc 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as the Federal Reserve Act.

And Whereas, upon a further accounting by the Receiver, it appears to my satisfaction that the sum of Forty Thousand Dollars was inadequate, and that, in order to pay the debts of said association it is necessary to further enforce the individual liability of the stockholders to the extent hereinafter mentioned, as provided by said Sections 5151 and 5234 of the Revised Statutes of the United States; Section lc, 156, Act of June 30, 1876, and Section 23, Act Approved December 23, 1913, known as the Federal Reserve Act.

Now, Therefore, by virtue of the authority vested in me by law, I do hereby make a further assessment and requisition upon the shareholders of the said The Lee County National Bank Of Marianna, for Forty Thousand Dollars, to be paid by them ratably on or before the Thirteenth day of December, 1935, and I hereby make demand upon each and every one of them for an additional fifty per cent of the par value of each and every share of the capital stock of said association owned by them, respectively, at the time of its failure; and I hereby direct A. F. Callaway, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

[fol. 8] In Witness Whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this Sixth day of November, A. D. 1935.

J. F. T. O'Connor, Comptroller of the Currency.

(Seal.)

IN UNITED STATES DISTRICT COURT

ANSWER—Filed March 15, 1939

Comes Mrs. Ella M. Ray, defendant herein, and for answer to the complaint of the plaintiff herein, states:

1

She admits all the allegations of the complaint.

2

The right of action set forth in the complaint did not accrue within three years next before the commencement of this action and the same is barred by the statute of Limitations and this defendant expressly pleads the statute of limitations of the State of Arkansas, especially section 8928 of Pope's Digest of the statutes of the State of Arkansas, as a complete bar to the right of the plaintiff to maintain this action and recover herein.

Wherefore, premises considered, defendant prays that the cause against her be dismissed, that she have judgment for all costs herein expended and for all other proper and legal relief.

Respectfully Submitted, Daggett & Daggett, per J. B. Daggett, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

[fol. 9] No. H-8

E. B. FUTRALL, Receiver,

vs.

ELLA M. RAY

JUDGMENT—Filed October 4, 1939

This cause coming on to be heard this 4th day of October, 1939, upon the bill of complaint, and the answer and plea of the statute of limitations against the cause of action alleged in the complaint, and having been argued by counsel, and the Court being fully advised in the premises, it is

ordered, adjudged and decreed that said plea of the statute of limitations is well taken, and is hereby sustained, and the bill of complaint herein be, and the same is hereby dismissed with costs to the defendant to be taxed.

Harry J. Lemley, District Judge.

IN UNITED STATES DISTRICT COURT

REQUEST OF PLAINTIFF FOR CONCLUSIONS OF LAW—Filed December 6, 1939

The plaintiff, by his attorney, John C. Sheffield, requests the Court to make the following conclusions of law.

1. That the Statute of Limitations of the State of Arkansas does not apply to [the] and is not a bar to the right of the plaintiff to recover on the assessment levied by the Comptroller of the Currency on November 6, 1935, to be paid December 13, 1935.

2. That the Statute of Limitations begins to run from December 13, 1935, being the date fixed by the Comptroller of the Currency for the payment of the assessment levied November 6, 1935.

3. That the defendant, Ella M. Ray, having admitted all the allegations of the plaintiff's complaint, the plaintiff is entitled to judgment as prayed for the amount of $1,333.33 being the amount of the second assessment with interest at [fol. 10] the rate of six per cent per annum on the amount of $1,333.33 from December 13, 1935, until paid.

E. B. Futrall, Receiver of the Lee County National Bank, by John C. Sheffield, Attorney for the Trust.

IN UNITED STATES DISTRICT COURT

CONCLUSIONS OF LAW BY COURT—Filed December 11, 1939

The Court doth declare the law herein as follows:

The facts alleged in the complaint are admitted. The cause of action alleged in the Complaint is governed by the three year statute of limitations, section 8928, Pope's Digest

of the Statutes of Arkansas, and the complaint not having been filed within three years from the date of the levy of the assessment by the Comptroller, the defendant's plea of the statute of limitations should be sustained and the complaint dismissed.

Harry J. Lemley, District Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed December 6, 1939

Notice is hereby given that E. B. Futrall, as Receiver of the Lee County National Bank, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit, from the final judgment entered in this action on the 4th day of October, 1939.

John C. Sheffield, Attorney for E. B. Futrall, Receiver of the Lee County National Bank.

Service of this notice of appeal acknowledged on this 7th day of December, 1939.

J. B. Daggett, Attorney for Mrs. Ella M. Ray, Defendant.

[fol. 11] IN UNITED STATES DISTRICT COURT

DESIGNATION OF POINTS ON WHICH PLAINTIFF RELIES—Filed December 6, 1939

The plaintiff, E. B. Futrall, as Receiver of the Lee County National Bank, by his attorney, John C. Sheffield, designates the following points on which he relies to reverse the judgment of the Court herein:

1. The Court erred in holding that the Statute of Limitations of the State of Arkansas, and particularly Section 8928 of Pope's Digest of the Statutes of Arkansas, bar a recovery of the assessment made by the Comptroller of the Currency on November 6, 1935, to be paid December 13, 1935.

2. The Court erred in holding that the statute of Limitations began to run on the day the assessment was made,

that is on November 6, 1935, instead of holding that the Statute began to run on the day the assessment was made payable by the Comptroller of the Currency, or December 13, 1935.

Wherefore, for these errors, and each of them, the plaintiff prays that the judgment be reversed and that this cause be remanded with instructions to the Court below to enter judgment for the plaintiff for the amount of the assessment levied November 6, 1935.

John C. Sheffield, Attorney for E. B. Futrall, As Receiver of the Lee County National Bank.

IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD ON APPEAL—Filed December 6, 1939

To The Clerk:

You will please include in the record on appeal, the following:

1. Complaint,
2. Answer of the defendant,
3. Judgment,
4. Request of plaintiff for conclusions of law,
5. Conclusions of law by Court,
6. Notice of Appeal,

[fol. 12] 7. Designation of points on which Plaintiff relies,

8. Designation of Record on Appeal.

John C. Sheffield, Attorney for E. B. Futrall, Receiver of the Lee County National Bank.

Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 13] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellant.)

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11653

E. B. FUTRALL, as Receiver of the Lee County National Bank, Appellant,

vs.

MRS. ELLA M. RAY

The Clerk will enter my appearance as Counsel for the Appellant.

John C. Sheffield.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Jan. 8, 1940.

(Appearance of Mr. J. B. Daggett as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

Daggett & Daggett. J. B. Daggett.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Jan. 10, 1940.

[fol. 14] (ORDER OF SUBMISSION)

March Term, 1940

Wednesday, March 20, 1940

This cause having been called for hearing in its regular order the same was argued by Mr. John C. Sheffield for appellant and by Mr. J. B. Daggett for appellee.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 15] (OPINION)

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11,653—May Term, A. D. 1940

E. B. FUTRALL, Receiver of the Lee County National Bank, Appellant,

vs.

MRS. ELLA M. RAY, Appellee

Appeal from the District Court of the United States for the Eastern District of Arkansas

[May 13, 1940]

Mr. John C. Sheffield for Appellant.

Mr. J. B. Daggett (Messrs. Daggett & Daggett and Mr. C. E. Daggett were with him on the brief) for Appellee.

Before Gardner, Sanborn and Woodrough, Circuit Judges

GARDNER, Circuit Judge, delivered the opinion of the Court.

This was an action brought by appellant as receiver of the Lee County National Bank, appointed by the Comptroller of the Currency, to recover an assessment made by the Comptroller of the Currency on the capital stock owned [fol. 16] by the appellee in a closed national bank. The parties will be referred to as they appeared below.

Plaintiff's complaint was in conventional form, but there was attached to it as an exhibit the order made by the Comptroller of the Currency levying the assessment. The answer admitted all the allegations of the complaint and pleaded the three year Arkansas Statute of Limitations. The lower court sustained the plea, and entered judgment of dismissal, and plaintiff has appealed.

An extended statement of facts would seem to be unnecessary because it is admitted that the only question involved is whether the Statute of Limitations began to run from November 6, 1935, the date the assessment was levied, or whether it did not begin to run until December 13, 1935, the date fixed by the Comptroller in his order for the payment of the assessment. There is no controversy about the

applicable statute. Futrall v. Branson, 8 Cir., 104 F. 2d 409.

The lower court held that the cause of action accrued on the date of the levying of the assessment, and hence, was barred by the three year Arkansas Statute of Limitations. There is no doubt that the liability of a stockholder in a national bank does not accrue until the assessment has been made by the Comptroller of the Currency. There were two assessments made by the Comptroller, the first bearing date July 6, 1934, for fifty per cent of the par value, and the second bearing date November 6, 1935, for an additional fifty per cent of the par value of the capital stock. It is admitted that the action to recover the first assessment is barred by the Statute of Limitations under the authority of Futrall v. Branson, supra. The order of assessment here under consideration, which was dated November 6, 1935, embodied a statement that the assessment made was "to be paid by them ratably on or before the 13th day of December, 1935, and I hereby make demand upon each and every one of them (the stockholders) [fol. 17] for an additional fifty per cent of the par value of each and every share of the capital stock of said association owned by them, respectively, at the time of its failure; and I hereby direct A. F. Callaway, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders."

It is the contention of plaintiff that the cause of action which came into existence with the entry of this order of assessment did not accrue until December 13, 1935, the date named by the Comptroller as the time for payment of the assessment. It is conceded that if the statute did not begin to run until December 13, 1935, then the action was not barred; but that if it began to run on November 6, 1935, the date of making the assessment, then it was barred. The Statute of Limitations began to run from the time the cause of action accrued, and this, we think, was the date on which the assessment was made. Pufahl v. Estate of Parks, 299 U. S. 217; Armstrong v. McAdams, 8 Cir., 46 F. 2d 931; Coffey v. Fisher, 6 Cir., 100 F. 2d 51.

In Armstrong v. McAdams, supra, this identical question was before us. It is urged, however, by plaintiff that there was no statement in the assessment there considered of a future payable date, and that the levy on its face was made

payable immediately. While the opinion does not disclose the wording of the order, a reference to the original record discloses that, as in the case at bar, the order of assessment fixed a date for payment. The assessment was dated August 10, 1926, but was by the order required to be paid on or before November 16, 1926. This court there said:

"The cause of action accrued August 10, 1926, the date the assessment was made by the Comptroller of the Currency. Suit was therefore instituted more than three years after the cause of action accrued * * *."

[fol. 18] But we think the question has been definitely put to rest by the decision of the Supreme Court in Pufahl v. Estate of Parks, supra. In the course of the opinion in that case it is said:

"The liability is imposed by the statute. The original subscriber and likewise an immediate or remote vendee of the shares assumes a status,—that of stockholder. The assumption of this status involves whatever conditions or burdens the federal statutes have imposed as incident to the holding of national bank shares. The contingent obligation to pay an assessment is rendered absolute by the Comptroller's action in ordering one; whether that action be taken during the stockholder's life or after his death. *From the moment of the Comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law against a living stockholder, or the executor of a deceased stockholder.* (Italics supplied.)"

The act of the Comptroller in fixing some future date for payment was not specifically authorized by the statute, but was an act of grace or courtesy voluntarily extended by him. It amounted to no more than a statement that while the assessment was due, he would not enforce it until a later date. Many of the authorities cited by plaintiff holding that the Statute of Limitations commences to run on the date on which the Comptroller makes the assessment payable, were decided prior to Pufahl v. Estate of Parks, supra, and many of them arose out of court receiverships under a prior statute, and in many of them the question of the Statute of Limitations was not considered. Strasburger v. Schram, C. A. D. C., 93 F. 2d 246, is in point, and is contrary to the conclusion reached by this court in Armstrong v. McAdams,

supra. The decision, while entitled to great respect is not of such persuasive character as to cause us to depart from our former decision. The opinion in that case makes no mention of the decision of the Supreme Court in Pufahl v. [fol. 19] Estate of Parks, supra. In the recent case of Coffey v. Fisher, supra, the Sixth Circuit considered this question. In the course of the opinion the court said:

"We recognize that there are decisions supporting his contention but the last pronouncement of the Supreme Court is to the contrary."

The court then cites Pufahl v. Estate of Parks, supra, and quotes from it the portion which we have already quoted in this opinion. The Coffey case involved the question of an extension of time of payment granted by the Comptroller. The court, in referring to the effect of such extension, said:

"While the extensions were acts of grace to unfortunate stockholders, and made here, as stated in the declaration, at their request, through their committee and for their convenience, nevertheless they do not for that reason toll the statute."

As the making of the assessment fixed the liability of the stockholders, the cause of action immediately accrued, and the act of the Comptroller purporting to extend the time for payment did not toll the statute. Donald v. Bird, 9 Cir., 85 F. 2d 663; Drain v. Stough, 9 Cir., 61 F. 2d 668; Johnson v. Greene, 9 Cir., 88 F. 2d 683; Rankin v. Barton, 199 U. S. 228.

The judgment appealed from is therefore Affirmed.

[fol. 20] (JUDGMENT)

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT,
MAY TERM, 1940

Monday, May 13, 1940

No. 11653

E. B. FUTRALL, Receiver of the Lee County National Bank,
Appellant,

vs.

MRS. ELLA M. RAY

Appeal from the District Court of the United States for the Eastern District of Arkansas

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Mrs. Ella M. Ray have and recover against E. B. Futrall, Receiver of the Lee County National Bank, the sum of Twenty Dollars for her costs herein and have execution therefor.

May 13, 1940.

[fol. 21] (CLERK'S CERTIFICATE)

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Arkansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions,

titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein E. B. Futrall, Receiver of the Lee County National Bank, was Appellant and Mrs. Ella M. Ray was Appellee, No. 11653, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the seventh day of June, A. D. 1940, a mandate was issued out of said Circuit Court of Appeals directed to the Judges of the District Court of the United States for the Eastern District of Arkansas.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-sixth day of August, A. D. 1940.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal.)

[fol. 22] Supreme Court of the United States

Order Allowing Certiorari—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 44,676. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 327. A. F. Rawlings, Receiver of The Lee County National Bank, Marianna, Arkansas, Petitioner, vs. Mrs. Ella M. Ray. Petition for a writ of certiorari and exhibit thereto. Filed August 12, 1940. Term No. 327, O. T., 1940.

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FILE COPY

AUG 12 1940

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 327

E. B. FUTRALL, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*,

versus

MRS. ELLA M. RAY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. ———

E. B. FUTRALL, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner,*

versus

MRS. ELLA M. RAY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, E. B. Futrall, as Receiver of The Lee County National Bank of Marianna, Arkansas, by direction of the Comptroller of the Currency of the United States, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the above captioned cause (R. 14, 18) entered May 13, 1940, and reported in 111 F. (2d) 695.

I.

OPINIONS OF COURTS BELOW.

The judgment of the District Court of the United States for the Eastern Division of the Eastern District of Arkansas appears on p. 8 of the Record. The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 111 F. (2d) 695, and appears in the Record on pp. 14 to 17.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals to be reviewed was entered on May 13, 1940 (R. 14). Jurisdiction is conferred upon this court to review this cause by writ of certiorari under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (U. S. C., Title 28, Section 347(a)).

III.

SUMMARY STATEMENT.

The facts are not in controversy. On or about March 6, 1933, the Comptroller of the Currency declared the Lee County National Bank of Marianna, Arkansas, to be insolvent and thereupon closed the bank. On May 1, 1934, the Comptroller of the Currency appointed A. F. Callaway as receiver of said bank and he was subsequently succeeded by E B. Futrall (R. 1). On July 6, 1934, the Comptroller of the Currency levied an assessment upon all of the stockholders of said bank, to be paid by them on or before August 13, 1934, equal to fifty *per centum* of the par value of each and every share of the capital stock of said association including an assessment against the respondent, Ella M. Ray, in the amount of $1,333.33, said assessment being in the sum of $50.00 per share on 26-2/3 shares of the capital stock of said bank. The Comptroller made demand for the payment of the assessment (R. 2, 5).

On November 6, 1935, the Comptroller levied a second assessment upon all of the shareholders of said bank to be paid on or before December 13, 1935, equal in amount to the first assessment, including an assessment against the respondent in the amount of $1,333.33, and demanded payment thereon (R. 5, 6). Upon failure of the respondent to pay said assessments, these proceedings to enforce collection thereof were instituted in the District Court of the United States for the Eastern District of Arkansas on *December 7, 1938,* (R. 1, 8) to enforce the collection of an assessment in the sum of $2,666.66 with interest at the rate of six *per cent per annum* on the sum of $1,333.33 from August 13, 1934, and interest at the rate of six *per cent per annum* on the sum of $1,333.33, from December 13, 1935, on the national bank stock owned by respondent, Ella M. Ray.[1] The respondent filed her answer on March 15, 1939, (R. 8) admitting all the allegations of the complaint but pleading specifically the statute of limitations of the State of Arkansas as a complete bar to the right of petitioner to maintain his cause of action. The District Court sustained the respondent's plea and dismissed the bill of complaint (R. 8, 9).

Petitioner requested the District Court to render conclusions of law, in substance, as follows:

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[1] When this suit was instituted, the receiver relied upon *Armstrong* v. *McAdams,* (C. C. A. 8th, 1931) 46 F. (2d) 931, as authority for the proposition that the five year statute of limitations of Arkansas was applicable. On March 6, 1939, which date was prior to the District Court's ruling in the instant case, the Arkansas Supreme Court handed down its opinion in *Vandover* v. *Lumber Underwriters et al.,* 126 S. W. (2d) 105, 110, holding that the three year statute of Arkansas applied to actions to enforce national bank stockholders' liability. The Eighth Circuit Court of Appeals thereupon in *Futrall* v. *Branson,* (June 20, 1939) 104 F. (2d) 409, in effect overruled *Armstrong* v. *Adams, supra,* on the authority of *Vandover* v. *Lumber Underwriters et al., supra.* Hence, the receiver's action to enforce the first fifty *per centum* assessment was barred in any event and the appeal in the instant case was limited to the second fifty *per centum* assessment.

(1) The Arkansas statute of limitations is not a bar to the right of the receiver to recover the assessment levied by the Comptroller of the Currency on November 6, 1935, to be paid December 13, 1935;

(2) The statute of limitations begins to run from December 13, 1935, the date fixed by the Comptroller for the payment of the second assessment;

(3) The respondent, having admitted all of the allegations of the complaint, petitioner is entitled to recover judgment for the amount of $1,333.33 and interest at the rate of six *per cent per annum* on said amount from December 13, 1935, until paid (R. 9, 10).

The District Court concluded that in as much as the complaint was not filed within three years from the date of the levy of the assessment by the Comptroller, the defendant's plea of the statute of limitations should be sustained and the complaint dismissed (R. 10).

On appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgment of the District Court was affirmed. 111 F. (2d) 695 (R. 14).

IV.

THE QUESTION PRESENTED.

Was the Receiver's suit barred by the Arkansas three year statute of limitations, the suit having been filed more than three years from the date of the Comptroller's levy of the assessment, but less than three years from the date the assessment was made payable?

V.

SPECIFICATION OF ERRORS.

The Appellate Court erred in holding that the Receiver's suit for collection of the second fifty *per centum* assessment was barred by the Arkansas three year statute of limitations.

The Appellate Court erred in holding that the cause of action accrued from the date the Comptroller levied the assessment.

The Appellate Court erred in failing to hold that the cause of action would not accrue until the date set by the Comptroller of the Currency for payment of the assessment liability.

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner believes that the writ of certiorari should be granted because:

(a) The ruling of the Circuit Court of Appeals in this case that the Arkansas three year statute of limitations commenced to run from the date the Comptroller levied the assessment rather than from the date the assessment was made payable, appears to be directly in conflict with the decisions of four other Circuit Courts of Appeal. See: *Strasburger* v. *Schram,* (App. D. C. 1937) 93 F. (2d) 246; *Reich* v. *Van Dyke,* (C. C. A. 3rd, 1939) 107 F. (2d) 682; *Haight* v. *First Trust and Deposit Co.,* (C. C. A. 2nd, 1940) 112 F. (2d) 572; *MacPherson* v. *Schram,* (C. C. A. 5th, 1940) 112 F. (2d) 674.

(b) The question presented in the instant case is of substantial importance in that it is, or will be, involved in the liquidation of other national banks now in receivership, and an authoritative determination of the question by this court will facilitate the administration of the affairs of these banks by the Comptroller of the Currency.

(c) The ruling of the Circuit Court of Appeals that the cause of action accrued on the date the Comptroller levied the assessment involves an important question of law which has not been but should be settled by this Court. The discussion herein shows that the

decision of this court in *Pufahl* v. *Estate of Parks*, (1936) 299 U. S. 217, relied upon by the Circuit Court of Appeals as determinative of this matter, did not pass upon the particular question here involved and statements in the opinion thereof in regard thereto must be considered as *dicta*, because the settlement of the question was not necessary for a decision in the *Pufahl case*.

VII.

DISCUSSION.

The Cause of Action in This Case Did Not Accrue Until the Date Set by the Comptroller of the Currency for Payment of the Assessment Liability, and Hence it is not Barred by the Three Year Statute of Limitations.

The provisions of the National Bank Act, (Act of June 3, 1864, c. 106, 12 U. S. C., Sec. 63 and 64; Act of June 30, 1876, c. 156, 19 Stat. 63, Sec. 5234 of the Revised Statutes; 12 U. S. C., Sec. 191 and 192), create statutory personal liability of shareholders in national banks for the debts and obligations of the banks and authorize the Comptroller of the Currency, through duly appointed receivers, to enforce such personal liability.

Petitioner submits that the weight of authority is to the effect that the liability of a shareholder for such assessment does not become due and payable until the Comptroller of the Currency determines the necessity for its collection, levies the assessment therefor, and fixes the time of its payment, and that the right of the receiver to bring suit upon the assessment does not come into existence until the date fixed by the Comptroller for the payment of the assessment thus levied. In *Kennedy* v. *Gibson*, (1869), 8 Wall. 498, at p. 505, it was said:

> "The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary

to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver."

It has been the uniform and longstanding practice of the Comptroller of the Currency, in collecting assessments from shareholders of insolvent national banks, to fix in the order of assessment, a future date for the payment of the assessment and formal notice to and demand upon the shareholders so indicates. The practice was followed in the instant case (R. 5-8). This practice was recognized by the United States Court of Appeals for the District of Columbia in the case of *Strasburger* v. *Schram,* (1937) 93 F. (2d) 246, wherein Judge Groner stated (at page 248):

"We take judicial notice of the fact that for many years it has been the general practice of the Comptroller, after determination that an assessment on stockholders in a national bank is necessary and of the amount thereof, to fix a date when payment must be made. The practice is a reasonable one, since it furnishes time and opportunity to the debtor to pay without suit and in some cases opportunity for reorganization and resumption of business; and we have been referred to no law and have found none ourselves to challenge the authority of the Comptroller to fix the time of payment and to extend it within reasonable limits from time to time. Nor have we any doubt that when this is done the receiver cannot commence an action against the stockholder until after the date fixed, for the simple reason that until such date the assessment is not due; or, in other words, does not exist as a complete right which the owner may enforce by going into court."

It has been stated by this Court from time to time that great weight may properly be given to the settled construction of a statute by the Executive Department charged with its administration, and that such construction should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States* v. *Jackson,* (1929) 280 U. S. 183, 193; *Heath* v. *Wallace,* (1891) 138 U. S. 573, 582; *Brewster* v. *Gage,* (1929) 280 U. S. 327, 336; *Inland Waterways Corp.* v. *Young,* (No. 6, U. S. S. Ct., March 25, 1940).

In as much as it is clearly within the discretion of the Comptroller of the Currency as to whether he will levy an assessment at all, and if so, at what stage in the liquidation of the particular receivership he will do so, it would seem necessarily to follow that it is also within his discretion to prescribe or fix the date such assessment is to become due and payable. Conceding that the Comptroller could levy an assessment and make it payable forthwith and thus subject the shareholder to immediate suit for collection of the assessment, certainly the Comptroller, instead of making the assessment payable immediately, can make it payable at a designated future date. The portion of the order levying the assessment and thus creating the liability is necessarily qualified by that portion of the same order which fixes the date the assessment is payable, such latter provision thereby having the effect of delineating and defining the enforcibility of the liability thus created. The cause of action upon the assessment thus levied cannot legally come into being until there has been default in payment on the date fixed for payment by the assessment order. The situation of the debtor, in such event, is analogous to that of the debtor on a promissory note payable at a future date. His obligation exists from the execution of the note, but he cannot be sued upon the note until it becomes due and is in default. This position seems to be within the clear purport of *Strasburger* v. *Schram, supra* (pg. 246) and it also seems to be indicated

in: *Deweese* v. *Smith,* 106 Fed. 438, 446; (C. C. A. 8th, 1901) affirmed 187 U. S. 637; *Rankin* v. *Miller,* (Del. 1913) 207 Fed. 602, 610; *King* v. *Pomeroy,* (C. C. A. 8th, 1903) 121 Fed. 287, 297; *Hall* v. *Ballard,* (C. C. A. 4th, 1937) 90 F. (2d) 939, 945.

The Arkansas statute of limitations provides (Section 8928, Pope's Digest of Statutes of Arkansas, (1937):

> "The following actions shall be commenced within three years after the cause of action shall accrue, and not after:
>
> First. All actions founded upon any contract or liability, expressed or implied, not in writing."

The court below failed to cite and we have found no Arkansas Supreme Court decisions indicating that the Arkansas three year statute of limitations would commence to run from the date the Comptroller levied the second 50 *per centum* assessment on November 6, 1935, whereas practically all courts which have passed upon the question, including four other Circuit Courts of Appeal and various District Courts, have held that the applicable state statute of limitations commences to run from the date fixed by the Comptroller for payment of the assessment.

The Supreme Court of Arkansas has held: *"It is well settled that the statue of limitations does not begin to run in any case until there is a complete and present cause of action." Holloway* v. *Morris,* (1931) 182 Ark. 1086, 34 S. W. (2d) 750, Also see: *Louisville Silo & Tank Co.* v. *Thweatt,* (1927) 174 Ark. 437, 295 S. W. 710; *Cairo & Fulton R. R. Co.* v. *Parks,* (1877) 32 Ark. 131, 152; *Denton's Ex'rs.* v. *Embury & Young,* (1849) 10 Ark. 228, 232. Even in suits for recovery of debts the Supreme Court of Arkansas has looked for the payment date, it appearing both in *Sturdivant* v. *McCorley,* (1907) 83 Ark. 278, 281, 103 S. W. 732 and *Kempner* v. *Gans,* (1908) 87 Ark. 221, 228, 111 S. W. 1123, that the court said: *"as no time was set* for the payment, the debt was in law payable on demand."

There can be no question but what the assessment made by the Comptroller in the instant case fixed a time for payment of the assessment by the shareholders of the insolvent bank (R. 5, 6).

While the Arkansas statutes govern as to the period of time within which an action must be brought, the power of the Comptroller of the Currency to order an assessment, to fix a date for the payment thereof, and the effect of such an order, involves Federal statutes and their interpretation, and in such a field the Federal Courts are supreme and not controlled by state court decisions. *Erie R. Co.* v. *Tompkins,* (1938) 304 U. S. 64, 78; *Board of County Commissioners* v. *United States,* (1939) 308 U. S. 343, 349; *Deitrick* v. *Greaney,* (1940) 309 U. S. 190, 200; *Downey* v. *City of Yonkers,* (S. D. N. Y. 1938) 23 F. Supp. 1018, 1023; affirmed (C. C. A. 2d. 1939) 106 F. (2d) 69 and Nos. 542/3/4/5 U. S. S. Ct., Apr. 22, 1940.

The general rule is stated in 1 Corpus Juris Secundum, Section 124 at page 1386 and 1387 as follows:

> "As applied to a cause of action, the term 'to accrue' means to arrive, to commence, to come into existance, to become a present enforcible demand, and a cause of action is deemed to have accrued when facts exist which authorize one party to maintain an action against another, or at the moment when the party owning it has a legal right to sue thereon.
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> • • • •
>
> "A creditor's legal right to sue his debtor accrues when the debt or demand is due and not before."[2]

Volume 2, Wood on Limitations (4th Ed.) Section 164, p. 797, makes this statement with respect to assessments, taxes, etc.:

> "Where an assessment or tax is laid, and by ordinance or statute a certain time is fixed within which

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[2] As authority for this rule of law the following Arkansas case is cited in support thereof. *Jones* v. *Dyer,* 92 Ark. 460; 123 S. W. 757.

it may be paid, the person against whom it is laid has the whole of such period within which to pay it, and the statute does not begin to run thereon until such time has expired. Thus, where an assessment was imposed by an ordinance which provided that, unless paid within twenty days, the debtor should be subjected to penalty and interest, it was held that the statute began to run from the expiration of the twenty days; and the same rule applies in the case of taxes. If the statute or the note under which it was raised specifies a certain time within which it shall be paid, the taxpayer has the whole of that period to pay it in, and the statute does not begin to run until such period has elapsed."

In 6 Williston on Contracts (Rev'd. Edition 1938) Sec. 2040, it is stated:

"It is a fundamental principle that the (statute of limitations) does not begin to run until any condition necessary to the existence of a right of action has happened, * * *.

"Where, moreover, an obligation is payable a certain time after demand, the statute does not begin to run until demand has been made and the specified time thereafter has elapsed."

In 1 Morse on Banks and Banking, Sec. 678, it is stated:

"The right of action against a stockholder of an insolvent national bank does not accrue until assessment is made by the Comptroller, and until there has been a demand of payment and refusal to pay. The national banking act fixes no definite time within which the Comptroller must act."

Until the United States Court of Appeals for the District of Columbia decided the case of *Strasburger* v. *Schram*, on November 15, 1937, 93 F. (2d) 246, there was no authoritative decision directly in point on the question here involved. However, certain expressions by this Court were found helpful by the Court of Appeals for the District of Columbia as indicating the principle that the date

fixed by the Comptroller for payment and not the date of assessment was the date when the cause of action accrued and the statute of limitations began to run.

In *McDonald* v. *Thompson*, (1902) 184 U. S. 71, the Court said at p. 72:

> "As the cause of action in this case accrued on July 10, 1893, when the assessment was made payable, *Hawkins* v. *Glenn*, 131 U. S. 319; *Glenn* v. *Marbury*, 145 U. S. 499; *Thompson* v. *German Insurance Company*, 76 Fed. Rep. 892; *Van Pelt* v. *Gardner*, 54 Neb. 701 * * *".

And in *McClaine* v. *Rankin*, (1905) 197 U. S. 154, 158, the Court said:

> "And as this action was commenced within three years, but not within two years, *after the assessment became due and payable*, the question is whether subdivision 3 of Sec. 4800 applies."

Again, this Court had before it in *Bernheimer* v. *Converse*, (1907) 206 U. S. 516, an equity case in which the court ordered an assessment against the shareholders of a Minnesota manufacturing corporation. The order required each shareholder to pay the amount of the assessment to the receiver within 30 days after the date of the order and on the suggestion that the case was barred by the statute of limitations, the Court stated at p. 534:

> "The cause of action did not accrue until the receiver could sue upon the assessment after the stockholder had failed to pay, as required by the order of the Minnesota Court of December 22, 1902."

The order was to pay within 30 days after the date of the order and it was this latter date, rather than the date of the order, on which this Court said the right of action accrued.

The Circuit Court of Appeals for the Sixth Circuit recognized this principle in *Barbour* v. *Thomas*, (1936) 86 F. (2d) 510, *cert. denied* 300 U. S. 670. In discussing the as-

sessment on the stockholders of the First National Bank-Detroit on May 16, 1933, and the receiver's right to enforce such assessment against the stockholders of the Detroit Bankers Company, a bank stockholding company, the court said at p. 514:

> "He [the national bank receiver] could not commence an action before July 31, 1933, since the assessments were not due until that date."

In *Strasburger* v. *Schram, supra,* the Court of Appeals for the District of Columbia had squarely before it the single question of whether the cause of action accrued upon the declaration by the Comptroller of the deficiency or whether it accrued on the final date fixed by the Comptroller for payment. The appellant in that action claimed the date the Comptroller declared the deficiency and fixed the amount was the date the action accrued, while the receiver contended the date fixed for payment was the controlling date. The court held that until the unconditional liability to pay is fastened on the debtor, no action can be maintained against him and the statute does not begin to run in his favor. Accordingly, it was the opinion of the court that no liability accrued on the assessment until the date when the same was made payable.

In the case of *Reich* v. *Van Dyke,* (1939) 107 F. (2d) 682, the United States Circuit Court of Appeals for the Third Circuit, in affirming the decision of the United States District Court for the Middle District of Pennsylvania, reported in 27 F. Supp. 436, stated that the sole question involved was whether the Pennsylvania statute of limitations would run from the date of assessment against shareholders as levied by the Comptroller or would run from the payment date. Judge Clark held that "cause", as used in the Pennsylvania statute providing that actions for debt shall be commenced within six years next after the cause of such action, means when the action "accrues" or "arises", and the right to sue becomes available. That

date was held to be the payable date of the assessment and hence the date from which the statute began to run.

The question of the accrual date of the cause of action to recover the assessment on national bank stock was likewise at issue in *Haight, Receiver of the Salt Springs National Bank of Syracuse, N. Y.* v. *First Trust and Deposit Company,* (N.D. N.Y. 1939) 33 F. Supp. 72. On May 1, 1934, the Comptroller ordered the assessment with a demand for payment on or before June 8, 1934. Suit was begun May 21, 1937. There was no question but that the three year statute of limitations, as set forth in Section 49 of the New York Civil Practice Act governed. The dispute was as to when the statute began to run, that is, when the cause of action accrued. Judge Bryant held that until default on June 8, 1934, the plaintiff receiver had no right of action and that the action was commenced within the statutory period. On appeal to the Circuit Court of Appeals for the Second Circuit, the Court affirmed the United States District Court in a *per curiam* opinion on the authority of *Strasburger* v. *Schram, supra,* and *Reich* v. *Van Dyke, supra.* The Circuit Court of Appeals opinion is reported in 112 F. (2d) 572.

Again in *MacPherson* v. *Schram,* (C. C. A. 5th, 1940) 112 F. (2d) 674, the United States Circuit Court of Appeals for the Fifth Circuit in a case involving the identical question held that the three year statute of limitations of the State of Florida did not bar a suit filed by a national bank receiver more than three years after the date the Comptroller levied the assessment on the shareholders but less than three years from the date the assessment was made payable.

It was also material to the decision of the United States District Court for the Northern District of West Virginia in *Hardesty* v. *Corrothers, et al,* (January 20, 1940) 31 Fed. Supp. 365, whether the receiver's right of action to recover the assessment on national bank stock "accrued" within five years next before the commencement of the action.

The assessment was levied against the stockholders on March 19, 1934, "to be paid by them on or before the 26th day of April, 1934." The action was instituted April 24, 1939. Following *Strasburger* v. *Schram, supra,* the court held that liability upon a national bank stock assessment does not "accrue" within the meaning of the West Virginia statute of limitations at date of assessment, but at the date when the assessment was made payable.

The United States District Court for the Western District of Kentucky in *Anderson* v. *Abbott,* (1938) 23 F. Supp. 265, also passed upon this question in the following manner at p. 268:

> "An action against shareholders for an assessment does not accrue until the assessment is due and payable. The assessment was levied on February 20, 1931, and payable on April 1, 1931. This proceeding was instituted on February 19, 1936. It was April 1, 1931, that the right of action accrued. Strasburger v. Schram, App. D. C., 93 F. (2d) 246; Barbour v. Thomas, 6 Cir., 86 F. (2d) 510; McDonald v. Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. Ed. 437."

A similar construction was given to the Illinois statute of limitations in the case of *Culhane* v. *Smith,* (N. D. Ill. 1937) 19 F. Supp. 226, 227, the court holding that the cause of action accrued on the date fixed for payment of the assessment.

The same conclusion has been adopted by the state courts in New York and New Jersey in *Meeker* v. *Oramam Realty Corporation,* (App. Div. N. Y. Sup. Ct. 1938) 2 N. Y. S. (2d) 574, 575, affirmed by the New York Court of Appeals (1939) 281 N. Y. 868, and *Howell* v. *Fogg,* (C. C. N. J., Cape May County, 1939) 7 Atl. (2d) 282, in cases likewise holding that under the respective state statutes of limitation the cause of action would not accrue until the last payment date for the assessment as fixed by the Comptroller of the Currency.

The Circuit Court of Appeals in the instant case bases its opinion on the decision and language used by this Court

in *Pufahl* v. *Estate of Elvira J. Parks, Deceased,* (1936) 299 U. S. 217. We submit that case in no way involves the question presented here and does not pretend to pass upon such a situation. Any statements made concerning the accrual of an assessment liability were merely *dicta* and without reference to any subsequent fixed payment date. No mention was made of a due date for the payment of the assessment and it is apparent that such date was wholly immaterial in deciding that case.

In *Coffey* v. *Fisher,* (C. C. A. 6th, 1938) 100 F. (2d) 51, also relied upon by the Circuit Court of Appeals for the Eighth Circuit in the instant case, the receiver brought suit to enforce the statutory liability of the estate of a deceased stockholder. It is submitted that the case is distinguishable from the instant case in that while the court held in the *Coffey* case that the suit was barred under the provisions of Section 8604 of the Tennessee Code, such decision was founded on the premise that the right to sue existed as of the date of the levy of the assessment, notwithstanding the fact that the assessment order provided for future dates of payment of the assessment (Op. p. 54). Such assumption by the court seems obvious error in that it nullifies that portion of the order of assessment which fixes the future date of payment and thereby renders the stockholder subject to immediate suit notwithstanding the Comptroller provides that he is not required to pay before the specified future date.

The Circuit Court of Appeals in its decision in the instant case makes the statement (R. 17) that, "as the making of the assessment fixed the liability of the stockholders, the cause of action immediately accrued, and the act of the Comptroller purporting to extend the time for payment did not toll the statute." An analysis of the cases cited by the court in support of this statement will, we believe, show that in only one of the four cases cited in support thereof was the date fixed for payment of the assessment a material factor in determining the case. That decision,—*Johnson* v. *Greene,* (C. C. A. 9th, 1937) 88

F. (2d) 683,—does not in any way determine the question presented in the instant case. There the Circuit Court of Appeals for the Ninth Circuit had before it the construction of a California statute of limitations which is different from the Arkansas statute of limitations in that the applicable California statute provides that an action on a statutory liability must "be brought within three years after * * * the liability was *created.*" Liability for assessment on national bank stock, the court held, was created on the date of the Comptroller's order and the limitation period began to run from that date, rather than the date fixed for the payment of the liability.

It will be observed that in *Strasburger* v. *Schram, supra; Reich* v. *Van Dyke, supra; Haight* v. *First Trust and Deposit Co., supra* and *MacPherson* v. *Schram, supra,* the Court of Appeals for the District of Columbia and the Circuit Courts of Appeal of the Second, Third and Fifth Circuits, had squarely presented the question of whether the cause of action accrued on the assessment date, or on the payable date, and in each instance the courts held the cause of action accrued from the date set for payment of the assessment as distinguished from the date the assessment was levied. The same conclusion was reached by the United States District Courts in West Virginia, Kentucky and Illinois in the cases of *Hardesty* v. *Corrothers, supra; Anderson* v. *Abbott, supra; Culhane* v. *Smith, supra,* and by the New York and New Jersey state courts in *Meeker* v. *Oramam Realty Corp., supra* and *Howell* v. *Fogg, supra.* The Circuit Court of Appeals in the instant case, therefore, in holding that the cause of action accrued from the assessment date, as distinguished from the payment date, is the only Appellate Court to so hold in a case where this point was decisive in determining the result of a suit to collect the shareholder's assessment levied by the Comptroller of the Currency, and as the court in the instant case is not supported by any Arkansas state court decision so construing the applicable statute of limitations, we submit that the decision announced is erroneous.

VIII.

CONCLUSION.

It is submitted that the foregoing discussion and citation of authorities demonstrate that the decisions of the courts below were erroneous. In the interest of uniformity of decisions applicable to the administration of all insolvent national banks, and in order that the present doubt as to the correct rule of law to follow may be settled, it is urged that this Honorable Court entertain a review of this case on writ of certiorari.

Respectfully submitted,

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GEORGE P. BARSE,
LEE ROY STOVER,
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Attorneys for the Comptroller of the Currency, of Counsel.

APPENDIX.

U. S. C. Title 12, Sec. 63.

The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association existing on June 22, 1874, under State laws, having not less than $5,000,000 of capital actually paid in, and a surplus of 20 per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of 20 per centum shall be kept undiminished, and be in addition to the surplus provided for in this chapter; and if at any time there is a deficiency in such surplus of 20 per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of this chapter relating to dissolution and receivership. (R. S. Sec. 5151; Dec. 23, 1913, c. 6, Sec. 23, 38 Stat. 273.)

U. S. C. Title 12, Sec. 64:

The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent

that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, Sec. 23, 38 Stat. 273.)

U. S. C. Title 12, sec. 191.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192. (June 30, 1876, c. 156, sec. 1, 19 Stat. 63.)

U. S. C. Title 12, sec. 192.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts and,

on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings. * * * (R. S. sec. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, sec. 339, 49 Stat. 721.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 327.

A. F. RAWLINGS, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner.*

v.

MRS. ELLA M. RAY, *Respondent.*

BRIEF OF PETITIONER.

JOHN C. SHEFFIELD,
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GEORGE P. BARSE,
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troller of the Currency in said order for payment of the assessment. Hence, the Arkansas statute of limitations did not start to run until after the expiration of said date 10

(4) Four other Circuit Courts of Appeal and several United States District Courts have squarely decided the question of whether the cause of action accrued on the assessment date or on the payable date and in each instance the Court has held that the cause of action accrued from the date fixed by the Comptroller for payment of the assessment as distinguished from the date the assessment was levied 19

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 327.

A. F. RAWLINGS, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*.

v.

MRS. ELLA M. RAY, *Respondent*.

BRIEF OF PETITIONER.

I.

OPINIONS BELOW.

No written opinion was rendered by the District Court of the United States for the Eastern Division of the Eastern District of Arkansas; its formal judgment appears at Page 8 of the Record. The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 111 F. (2d) 695, and appears in the Record on Pages 13 to 16.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347(a)).

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on May 13, 1940 (R. 17). The petition for writ of certiorari was filed on August 12, 1940. Motion to substitute A. F. Rawlings, present Receiver of the Lee County National Bank, as petitioner in place and stead of E. B. Futrall, former receiver, was filed on August 17, 1940, and was presented to and granted by the Court on October 7, 1940.

The order of this Court granting the writ of certiorari was issued October 14, 1940 (R. 18).

III.

STATEMENT OF FACTS.

The facts are not in controversy. On or about March 6, 1933, the Comptroller of the Currency declared the Lee County National Bank of Marianna, Arkansas, to be insolvent and thereupon closed the bank. On May 1, 1934, the Comptroller of the Currency appointed A. F. Callaway receiver of said bank and he was subsequently succeeded by said E. B. Futrall (R. 1). On July 6, 1934, the Comptroller of the Currency levied an assessment (R. 1-4) upon all of the stockholders of said bank, to be paid by them on or before August 13, 1934, equal in amount to fifty *per centum* of the par value ($100.) of each and every share of the capital stock of said association including an assessment against respondent, Ella M. Ray, in the amount of $1,333.33, said assessment being in the sum of $50.00 per share on 26⅔ shares of the capital stock of said bank. For reasons hereinafter indicated (*infra*, p. 3) enforcement of this first assessment has been abandoned and no questions concerning the same are presented here.

On November 6, 1935, the Comptroller levied a second assessment (R. 5) upon all of the shareholders of said bank to be paid on or before December 13, 1935, equal in amount to the first assessment, including an assessment against respondent in the amount of $1,333.33, and demanded payment thereon (R. 6, 7). Respondent failed to pay said assess-

ments, and suit was filed by the then receiver against respondent in the District Court of the United States for the Eastern District of Arkansas on December 7, 1938 (R. 1, 8), to enforce collection of the two aforesaid assessments (of 50 per centum par value, each), for the aggregate sum of $2,666.66, with interest at the rate of six *per cent per annum* on the sum of $1,333.33 from August 13, 1934, and interest at the rate of six *per cent* per annum on the sum of $1,333.33, from December 13, 1935, on the 26⅔ shares of the stock of said bank owned by respondent, Ella M. Ray.[1] Respondent filed her answer on March 15, 1939, (R. 8) admitting all the allegations of the complaint but pleading specifically the statute of limitations of the State of Arkansas as a complete bar to the right of the receiver to maintain said cause of action.

The receiver requested, in substance, (R. 9) that the trial court rule that the statute of limitations did not begin to run until *December 13, 1935*—the date of payment fixed by the Comptroller in the order levying the assessment.

The District Court in its conclusions of law, (R. 9-10), ruled that in as much as the complaint was not filed within three years from November 6, 1935, the date of the *levy* of the assessment, respondent's plea of the statute of limitations should be sustained and the complaint must be dismissed (R. 9, 10).

---

[1] When said suit was filed, the receiver relied upon *Armstrong* v. *McAdams* (C. C. A. 8th, 1931), 46 F. (2d) 931, as authority for the proposition that the five year statute of limitations of Arkansas was applicable. On March 6, 1939, which was subsequent to the institution of the suit in the instant case, but was prior to the District Court's ruling therein, the Arkansas Supreme Court handed down its opinion in *Vandover* v. *Lumber Underwriters et al.*, 126 S. W. (2d) 105, 110, holding that the three year statute of Arkansas applied to actions to enforce national bank stockholders' liability. The Eighth Circuit Court of Appeals thereupon, in *Futrall* v. *Branson* (June 20, 1939) 104 F. (2d) 409, in effect overruled *Armstrong* v. *McAdams, supra,* on the authority of *Vandover* v. *Lumber Underwriters et al., supra.* Hence, the receiver's action to enforce the first fifty *per centum* assessment was barred in any event and the appeal in the instant case was limited to the second fifty *per centum* assessment.

Formal judgment dismissing the bill of complaint was thereupon entered (R. 8-9).

On appeal the judgment of the District Court was affirmed. 111 F. (2d) 695 (R. 13, 16).

IV.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that the Receiver's suit for collection of the second fifty *per centum* assessment accrued November 6, 1935, the date of levy of the assessment, and was barred by the Arkansas three year statute of limitations.

2. In failing to hold that said cause of action did not accrue until December 13, 1935, the date of payment fixed by the Comptroller of the Currency in the order levying the assessment, and that the cause of action was not barred by the Arkansas three year statute of limitations.

V.

THE QUESTION PRESENTED.

Was the Receiver's suit barred by the Arkansas three year statute of limitations, the suit having been filed more than three years from the date of the Comptroller's levy of the assessment, but less than three years from the date the assessment was payable?

VI.

STATUTES INVOLVED.

Sec. 5151 of the Revised Statutes, as amended by the Act of December 23, 1913, c. 6, Sec. 23, 38 Stat. 273, 12 U. S. C., Secs. 63 and 64; Act of June 30, 1876, c. 156, Sec. 1, 19 Stat. 63, 12 U. S. C., Sec. 191; Sec. 5234 of the Revised Statutes, 12 U. S. C., Sec. 192, creating personal liability of shareholders in national banks for the debts and obligations

of the bank and authorizing the Comptroller of the Currency, through duly appointed receivers, to enforce such liability. (Appendix, pp. 24-26.)

The Arkansas statute of limitations [Sec. 8928, Pope's Digest of Statutes of Arkansas, (1937); Crawford & Moses 1921 Digest of the Statutes of Arkansas, Sec. 6950] which provides:

> "The following actions shall be commenced within three years after the cause of action shall accrue, and not after:
>
> "First. All actions founded upon any contract or liability, expressed or implied, not in writing."

VII.

SUMMARY OF ARGUMENT.

The right to institute suit did not arise and consequently the cause of action did not accrue, prior to December 13, 1935,—the date fixed by the Comptroller of the Currency for payment of the assessment. Suit was filed December 7, 1938. Therefore, the cause of action against Respondent was not barred by the Arkansas three year statute of limitations.

(1) *The nature of the assessment liability, and the determination of the maturity or accrual of the cause of action thereon, are questions of substantive law originating in the Federal statutes creating the assessment liability. The interpretation and construction of such statutes are governed by the decisions of the Federal courts.*

(2) *The decisions of the Federal courts have established the general doctrine that Statutes of Limitations will not commence to run against a cause of action until the right to enforce the same by institution of suit has accrued.*

(3) *The order of the Comptroller of the Currency levying the assessment, and the demand upon respondent for payment of the assessment, unmistakably indicate that the right to institute suit to enforce collection of the assess-*

ment did not arise, and the cause of action against respondent did not accrue, until after the expiration of December 13, 1935,—the date fixed by the Comptroller of the Currency in said order for payment of the assessment. Hence, the Arkansas statute of limitations did not start to run until after the expiration of said date.

(4) *Four other Circuit Courts of Appeal and several United States District Courts have squarely decided the question of whether the cause of action accrued on the assessment date or on the payable date and in each instance the Court has held that the cause of action accrued from the date fixed by the Comptroller for payment of the assessment as distinguished from the date the assessment was levied.*

(5) *The ruling of the Circuit Court of Appeals for the Eighth Circuit in the instant case that the Arkansas three year statute of limitations commenced to run from the date of the assessment order rather than from the payable date thereof appears to be in conflict with the weight of authority as outlined in Point 4, supra (p. 19).*

VIII.

ARGUMENT.

The right to institute suit did not arise and consequently the cause of action did not accrue, prior to December 13, 1935,—the date fixed by the Comptroller of the Currency for payment of the assessment. Suit was filed December 7, 1938. Therefore, the cause of action against Respondent was not barred by the Arkansas three year statute of limitations.

(1) *The nature of the assessment liability, and the determination of the maturity or accrual of the cause of action thereon, are questions of substantive law originating in the Federal statutes creating the assessment liability. The interpretation and construction of such statutes are governed by the decisions of the Federal courts.*

The precise issue involved in the instant case, and the position thereon of the court below, is succinctly set forth by that court in the following extracts from its opinion (R. 13, 14):

> "An extended statement of facts would seem to be unnecessary because it is admitted that the only question involved is whether the Statute of Limitations began to run from November 6, 1935, the date the assessment was levied, or whether it did not begin to run until December 13, 1935, the date fixed by the Comptroller in his order for the payment of the assessment. *There is no controversy about the applicable statute. Futrall* v. *Branson,* 8 Cir., 104 F. 2d 409.
>
> * * * * * * * * * *
>
> "It is the contention of plaintiff that the cause of action which came into existence with the entry of this order of assessment did not accrue until December 13, 1935, the date named by the Comptroller as the time for payment of the assessment. *It is conceded that if the statute did not begin to run until December 13, 1935, then the action was not barred, but that if it began to run on November 6, 1935, the date of making the assessment, then it was barred.* The Statute of Limitations began to run from the time the cause of action accrued, and this, we think, was the date on which the assessment was made. Pufahl v. Estate of Parks, 299 U. S. 217; Armstrong v. McAdams, 8 Cir., 46 F. 2d 931; Coffey v. Fisher, 6 Cir., 100 F. 2d 51." (Italics inserted.)

The applicable Arkansas statute of limitations referred to in the foregoing quotation provides:

> "The following actions shall be commenced within three years *after* the cause of action *shall accrue,* and not after:
>
> "First. All actions founded upon any contract or liability, expressed or implied, not in writing." (*supra,* p. 5. Italics inserted.)

Conceding for discussion that, after the cause of action has accrued, the local or Arkansas statute of limitations

is thereafter controlling as to the time within which suit must be filed, nevertheless it would seem clear that inasmuch as the assessment liability, and the right of the receiver to enforce the same, was, as a matter of substantive law, created by, and founded upon, the Federal statutes (*supra*, p. 5; app. pp. 24-26), the nature of said liability, and the determination of the maturity or accrual of the cause of action thereon, present questions involving the interpretation and construction of Federal statutes and the policies predicated thereon. *Seabury, Receiver* v. *Green,* (1935) 294 U. S. 165, 168; *Forrest* v. *Jack,* (1935) 294 U. S. 158, 162; *Rankin* v. *Barton,* (1905) 199 U. S. 228, 232. These questions must be governed by the Federal decisions. *Erie R. Co.* v. *Tompkins,* (1938) 304 U. S. 64, 78; *Board of County Commissioners* v. *United States,* (1939) 308 U. S. 343, 349; *Deitrick* v. *Greaney,* (1940) 309 U. S. 190, 200; *Downey* v. *City of Yonkers,* (S. D. N. Y. 1938) 23 F. Supp. 1018, 1023; affirmed (C. C. A. 2d, 1939) 106 F. (2d) 69, and (April 22, 1940) 309 U. S. 590.

(2) *The decisions of the Federal courts have established the general doctrine that Statutes of Limitations will not commence to run against a cause of action until the right to enforce the same by institution of suit has accrued.*

The foregoing statement seems to be settled law, as indicated by: *United States* v. *Wurts,* (1938) 303 U. S. 414; *Borer* v. *Chapman,* (1887) 119 U. S. 587, 602; *Scovill* v. *Thayer,* (1881) 105 U. S. 143, 159; *Clark* v. *Iowa City,* (1874) 87 U. S. 583, 589; *Amy* v. *Dubuque,* (1878) 98 U. S. 470, 476.

The recent case of *United States* v. *Wurts,* (1938) 303 U. S. 414, 418, applies by analogy to the instant case. That case dealt with the question of when the right of the United States to recover an erroneous tax refund, accrued. The applicable Federal statute of limitations required suit to be brought "within two years after the making of such refund" and the question presented was whether the two year

limitation began when the refund was officially allowed, or when it was actually paid. In disposing of the question this Court said:

> "It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued. Obviously, the Government *had no right to sue this taxpayer* to recover money before money had been paid to him. The construction urged by respondent would allow the statute of limitations to begin to run against recovery on an erroneous payment before any such payment is made." (Italics inserted.)

The Federal decisions relating specifically to the question of accrual of the cause of action upon assessment liability of shareholders of national banks, is discussed herein at pages 19 to 22.

General Doctrine,—Arkansas Decisions.

While, as above indicated, it is our position that the Federal decisions are controlling upon the issues here involved, it may be noted that the decisions of the State of Arkansas are in full accord with the doctrines established by the Federal cases above cited, and are to the effect that the general rule is that the cause of action does not accrue, and the statute of limitations does not begin to run, until the right to file suit to enforce the cause of action has matured and is available. *Holloway* v. *Morris,* (1931) 182 Ark. 1096, 34 S. W. (2d) 750; *Smith* v. *Milam,* (1937) 195 Ark. 157, 110 S. W. (2d) 1062; *Holland* v. *Clark,* (1878) 32 Ark. 697; *Heise* v. *Bumpass,* (1883) 40 Ark. 545. *Louisville Silo & Tank Co.* v. *Thweatt,* (1927) 174 Ark. 437, 295 S. W. 710; *Cairo & Fulton R. R. Co.* v. *Parks,* (1877) 32 Ark. 131, 152; *Denton's Ex'rs.* v. *Embury & Young,* (1849) 10 Ark. 228, 232.

In suits for recovery of money obligations the Supreme Court of Arkansas has looked to the payment date. In *Sturdivant* v. *McCorley,* (1907) 83 Ark. 278, 281, 103 S. W.

732, the court said: *"As no time was set for the payment,* the debt was in law payable on demand." (Reporter Citation. Italics inserted.) Also see *Kempner* v. *Gans,* (1908) 87 Ark. 221, 228, 111 S. W. 1123.

(3) *The order of the Comptroller of the Currency levying the assessment, and the demand upon respondent for payment of the assessment, unmistakably indicate that the right to institute suit to enforce collection of the assessment did not arise, and the cause of action against respondent did not accrue, until after the expiration of December 13, 1935,—the date fixed by the Comptroller of the Currency in said order for payment of the assessment. Hence, the Arkansas statute of limitations did not start to run until after the expiration of said date.*

The order of the Comptroller of the Currency of November 6, 1935, levying the assessment upon the shareholders of the national bank involved in the instant case appears in the Record at pages 6-7, but for convenience of discussion the same is here repeated:

"November 6, 1935.

"No. 10854

"In the Matter of The Lee County National Bank of Marianna, Arkansas

"To All Whom It May Concern:

"Whereas, upon a proper accounting by the Receiver heretofore appointed to collect the assets of 'The Lee County National Bank Of Marianna,' Arkansas, and upon a valuation of the uncollected assets remaining in his hands on the Twenty-first day of June, 1934, it appeared to the satisfaction of the Comptroller of the Currency that in order to pay the debts of such association it would be necessary, to enforce the individual liability of the stockholders thereof to the extent of Forty Thousand Dollars, as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c 156, Act of June 30, 1876, and Sec-

tion 23, Act approved December 23, 1913, known as the Federal Reserve Act.

"And Whereas, upon a further accounting by the Receiver, it appears to my satisfaction that the sum of Forty Thousand Dollars was inadequate, and that, in order to pay the debts of said association it is necessary to further enforce the individual liability of the stockholders to the extent hereinafter mentioned, as provided by said Sections 5151 and 5234 of the Revised Statutes of the United States; Section 1c, 156, Act of June 30, 1876, and Section 23, Act Approved December 23, 1913, known as the Federal Reserve Act.

"Now, Therefore, by virtue of the authority vested in me by law, I do hereby make a further assessment and requisition upon the shareholders of the said The Lee County National Bank Of Marianna, for Forty Thousand Dollars, *to be paid by them ratably on or before the Thirteenth day of December, 1935, and I hereby make demand upon each and every one of them* for an additional fifty per cent of the par value of each and every share of the capital stock of said association owned by them, respectively, at the time of its failure; and I hereby direct A. F. Callaway, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

"In Witness Whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this Sixth day of November, A. D. 1935.

J. F. T. O'Connor, Comptroller of the Currency.
(Seal)" (Italics inserted)

In pursuance of the directions to the receiver contained in the foregoing order, the receiver, as of November 6, 1935, notified respondent (R. 5-6) that the Comptroller had levied the assessment under date of November 6, 1935, and that the same was "payable at the office of the Receiver, on or before December 13, 1935" and that deferred payments would "bear interest after December 13, 1935 at the legal rate in the State of Arkansas * * *", provision being made for abatement of such interest where installments of the

assessment were paid on and after December 13, 1935 in accordance with the schedule specified in the notice. Said notice, as thus given to respondent, provided in the last paragraph thereof:

> "You are therefore required to pay the assessment on the 26⅔ shares of stock standing in your name in accordance with the foregoing order and this notice. Your prompt compliance will be of great benefit to creditors of this trust and advance materially its liquidation.
>
> "A. F. Callaway, Receiver, The Lee County National Bank of Marianna, Arkansas.
>
> "To Ella M. Ray, 515 N. McClain, Memphis, Tennessee."

The above quoted order of the Comptroller of the Currency levying the assessment on a given date, but fixing the time of payment thereof at a future date therein specified, is in accord with the policy and practice to the same effect which has been followed by the Office of the Comptroller of the Currency since 1888. In this connection, there is set forth in the appendix hereof at page 26, a true copy of an order of the Comptroller of the Currency dated July 25, 1888 levying an assessment against the shareholders of the Commercial National Bank of Dubuque, Iowa, and fixing August 25, 1888 as the date of payment of said assessment.

In *Strasburger* v. *Schram,* 68 App. D. C. 87; 93 F. (2d) 246, the United States Court of Appeals for the District of Columbia had under consideration the precise type of question involved in the instant case. Schram, the receiver of First National Bank-Detroit sued Strasburger, as a shareholder of the bank, to recover upon an assessment liability, under an order of the Comptroller of the Currency of May 16, 1933 levying an assessment against the shareholders and fixing June 23, 1933 as the date for payment thereof. Thereafter the time for payment was extended by amendment of the assessment order, to July 31, 1933. The shareholder, Strasburger, was sued in the District of Columbia on July

22, 1936. The applicable statute of limitations for the District of Columbia provided that no action could be brought "after three years from the time when the right to maintain such action shall have accrued." The defendant, by appropriate motion, contended that the statute of limitations began to run from and after the 16th of May, 1933, and that the cause of action upon the assessment expired May 16, 1936. The receiver contended that the three year period started to run from and after July 31, 1933, the date last fixed by the Comptroller of the Currency for payment of the assessment and that inasmuch as suit had been filed on July 22, 1936 the time permitted by the three year statute had not expired.

The Court of Appeals held that the statute of limitations began to run from and after the fixed date of payment of the assessment. It will be observed from the following quotation from the opinion that the court commented, with approval, upon the long-standing practice of the Comptroller of the Currency in fixing a future date for the payment of a levied assessment and expressed its view that a receiver could not commence an action against a shareholder until after the date of payment so fixed, and accordingly that the cause of action upon the assessment liability did not accrue until after said date of payment. (Page 248.)

> "We take judicial notice of the fact that for many years it has been the general practice of the Comptroller, after determination that an assessment on stockholders in a national bank is necessary and of the amount thereof, to fix a date when payment must be made. The practice is a reasonable one, since it furnishes time and opportunity to the debtor to pay without suit and in some cases opportunity for reorganization and resumption of business; and we have been referred to no law and have found none ourselves to challenge the authority of the Comptroller to fix the time of payment and to extend it within reasonable limits from time to time. Nor have we any doubt that when this is done the receiver cannot commence an action against the stockholder until after the date fixed, for the simple reason that until such date the assessment is

not due; or, in other words, does not exist as a complete right which the owner may enforce by going into court. This was the view expressed by Judge Sanborn in the case of Deweese v. Smith (C. C. A.) 106 F. 438, 441, 66 L. R. A. 971. There he said: 'The acts of congress confer the power and impose the duty upon the comptroller to determine within the statutory limit the amounts that shall be paid by each stockholder upon his individual liability, and the times when he shall pay these amounts. The liability of the shareholder does not mature—does not become due—until the comptroller adjudges it to be payable and demands it, and it falls due in such amounts and at such times as he decrees.'

"Other cases expressing the same view are Rankin v. Miller (D. C.) 207 F. 602, King v. Pomeroy, (C. C. A.) 121 F. 287, and Hall v. Ballard (C. C. A.) 90 F. 2d. 939, 944. In the Rankin Case it was said that the period of limitation will commence to run only from the time the cause of action is fully matured through the making of an assessment and the arrival of the day when it becomes payable. In the King Case the assessment order was dated February 12th and was payable 60 days after that date, and there the court said that the cause of action accrued 60 days after February 12th and not before.

* * * * * * * * * *

"The view expressed in each of these cases seems to us reasonable and, as we think, is supported not only by what was said by the Supreme Court in McDonald v. Thompson, supra, but also by what was said in Bernheimer v. Converse, 206 U. S. 516, 534, 27 S. Ct. 755, 761, 51 L. Ed. 1163. That was an equity case in which the court ordered an assessment against the shareholders of a Minnesota corporation. The order required each shareholder to pay the amount of the assessment to the receiver within 30 days after the date of the order, and on the suggestion that the cause was barred by the statute of limitations the court said: 'The cause of action did not accrue until the receiver could sue upon the assessment after the stockholder had failed to pay, as required by the order of the Minnesota court.' "

The assessment order involved in the foregoing case of *Strasburger* v. *Schram*, presented, factually, somewhat

more complicated issues than the assessment order involved in the instant case in that, as above indicated, the assessment order in the Detroit bank had been amended several times so as to extend the date of payment in view of certain facts affecting the situation. Notwithstanding this, the United States Court of Appeals for the Sixth Circuit in the case of *Barbour* v. *Thomas,* (1936) 86 F. (2d) 510, cert. denied 300 U. S. 670, in commenting upon the enforcibility of the said Detroit bank assessment by the receiver said:

> "he could not commence an action before July 31, 1933, since the assessments were not due until that date." (Opinion p. 514.)

The *Barbour* v. *Thomas* case did not involve the issue present in the instant case, but it did concern seasonable action on the part of the receiver in prosecuting the assessment liability, and the foregoing comment by the court was made in that connection.

It appears to have been the practice in the Office of the Comptroller of the Currency prior to 1888 to make the assessment payable from the date of the order levying the assessment, as indicated by *Casey* v. *Galli,* (1876) 94 U. S. 673, 677 and *Bowden* v. *Johnson,* (1882) 107 U. S. 251, 263. The contrast between the two practices existing prior to, and after, 1888, with reference to the date of payment of the assessment, is commented upon in *Davis' Estate et al.* v. *Watkins,* (1898) 56 Neb. 288, 76 N. W. 575, where the court said at page 576 (of the reporter citation):

> "But the assessment made by the comptroller was payable on or before the 12th day of August, 1893, and we think that it drew interest from that date. In Casey v. Galli, 94 U. S. 673, it was held that the assessment drew interest from the date it was made; and the same ruling was made in Bowden v. Johnson, 107 U. S. 251, 2 Sup. Ct. 246. In each of those cases it appears that the assessment was payable on the date it was made. Here the assessment was payable 30 days after it was made, and, within the principle of the cases cited, would draw interest from the time it was payable."

It seems clear, in the light of the Federal court decisions construing the authority of the Comptroller of the Currency conferred by the National Banking Laws relating to assessment liability, that it is left entirely to the discretion of the Comptroller, in the exercise of the quasi judicial powers vested in him, to determine if and when an assessment shall be levied, and when payment thereof must be made. The doctrine in this respect was broadly stated in *Kennedy* v. *Gibson* (1869), 8 Wall. 498, at page 505 of the opinion:

> "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver."

In *Korbly* v. *Springfield Institution for Savings, et al.*, (1917) 245 U. S. 330, this court upheld the power of the Comptroller of the Currency to withdraw an assessment before it was paid, and, upon a subsequent determination of the necessity therefor, to levy a second assessment. In commenting upon the discretionary power thus exercised, this court said, at page 333, of its opinion:

> "From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction and has placed a liberal interpretation upon its pro-

visions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. *Studebaker* v. *Perry*, 184 U. S. 258; *Kennedy* v. *Gibson*, 8 Wall. 498; *United States* v. *Knox*, 102 U. S. 422; *Bushnell* v. *Leland*, 164 U. S. 684; and *Bowden* v. *Johnson*, 107 U. S. 251. There is nothing in the act to prevent the Comptroller from withdrawing an assessment before it is paid, or when it is partly paid, if it should be concluded that further payment is not necessary, and no form is prescribed in which such action shall be taken by him. *A large executive discretion is given to the Comptroller in this respect to adjust the assessments made, to the exigencies of each case, so that the shareholders may not be burdened by paying more than is necessary or at a time when the money for any reason cannot be advantageously used.* The wisdom of giving such large discretion to the Comptroller finds excellent illustration in the case before us. * * * We conclude that the claim that the Comptroller did not have power to recall the first assessment in whole or in part is unsound in principle and wholly unsupported by the terms of the act or by court decisions." (Italics supplied.)

Conceding that the Comptroller may levy an assessment and make it payable forthwith and thus subject the shareholder to immediate suit for collection of the assessment, certainly it seems logically to follow that the Comptroller, instead of making the assessment payable immediately, can make it payable at a designated future date. The portion of the Comptroller's order levying the assessment and causing the shareholders' contingent liability to become absolute, is necessarily qualified by that portion of the same order which fixes a future date for the payment of the assessment, such latter provision thereby having the effect of delineating the enforcibility of the liability thus created. The cause of action thus based upon the assessment, cannot, under the qualification fixing the future date of payment, become matured or accrued until the date of payment thus fixed, and the right to institute suit cannot arise until there has been default in payment on the date

fixed for payment by the assessment order. The situation of the shareholder, under such order, is analogous to that of a debtor on a promissory note payable at a future date. His obligation exists from the date of execution of the note and it is, of course, an absolute obligation, but he cannot be sued upon the note until it becomes due and he becomes in default.

In *Rankin* v. *Miller et al.*, (Del. 1913) 207 Fed. 602, 610, it became necessary to determine the date of maturity of the assessment liability of a shareholder of a national bank from the standpoint of the running of the Statute of Limitations. The language in the opinion passing upon this point seems to be particularly helpful.

> "But the period of limitation will commence to run only from the time the cause of action has fully matured through the making of an assessment and the arrival of the day when it becomes payable. * * * The second assessment for the collection of which this suit was brought was made November 22, 1900, and became payable December 22, 1900, a period of only one year, four months and eight days before the filing of the bill. It is thus clear that this suit is not directly or indirectly barred by any provision of the general statutes of limitation of Delaware. There is a broad distinction between the maturing of a liability as a prerequisite to the successful prosecution of an action for its enforcement, and the attaching of the liability upon the declaration of insolvency or the acquisition of the stock."

Bernheimer v. *Converse* (1907) 206 U. S. 516, applies by analogy to the instant case. The court had ordered an assessment against the shareholders of a Minnesota manufacturing corporation and directed that the amount thereof be paid to the court receiver within 30 days after the date of the order. The case was carried to this court, and in connection with the question of the running of the Statute of Limitations, this court stated, at page 534,

> "The cause of action did not accrue until the receiver could sue upon the assessment after the stockholder

had failed to pay, as required by the order of the Minnesota Court of December 22, 1902."

Also see:

McDonald v. *Thompson,* (1902) 184 U. S. 71;
McClaine v. *Rankin,* (1905) 197 U. S. 154, 158;
Deweese v. *Smith,* (1901) 106 Fed. 438, 441; affirmed, per curiam (1902) 187 U. S. 637;
King v. *Pomeroy,* (C. C. A. 8, 1903) 121 Fed. 287, 297;
Hall v. *Ballard,* (C. C. A. 4, 1937) 90 F. (2d) 939.

(4) *Four other Circuit Courts of Appeal and several United States District Courts have squarely decided the question of whether the cause of action accrued on the assessment date or on the payable date and in each instance the Court has held that the cause of action accrued from the date fixed by the Comptroller for payment of the assessment as distinguished from the date the assessment was levied.*

The cases in the four other circuit courts of appeal are:

Strasburger v. *Schram* (App. D. C. 1937) 93 F. (2d) 246, 248; *supra,* page 12.
Reich v. *Van Dyke* (C. C. A. 3, 1939) 107 F. (2d) 682.
Haight, Receiver of the Salt Springs National Bank of Syracuse, N. Y. v. *First Trust and Deposit Company,* (C. C. A. 2d, 1940) 112 F. (2d) 572.
McPherson v. *Schram* (C. C. A. 5, 1940) 112 F. (2d) 674.

The cases in the United States District Courts, are:

Hardesty v. *Corrothers, et al.* (N. D. W. Va. 1940) 31 F. Supp. 365.
Culhane v. *Smith* (N. D. Ill., 1937) 19 F. Supp. 226.

In addition may be noted the following State court decisions:

Meeker v. *Oramam Realty Corporation* (App. Div. N. Y. Sup. Ct. 1938) 2 N. Y. S. (2d) 574, 575, affirmed by the New York Court of Appeals (1939) 281 N. Y. 868, 24 N. E. (2d) 502.

Howell v. *Fogg* (C. C. N. J., Cape May County, 1939) 7 Atl. (2d) 282.

(5) *The ruling of the Circuit Court of Appeals for the Eighth Circuit in the instant case that the Arkansas three year statute of limitations commenced to run from the date of the assessment order rather than from the payable date thereof appears to be in conflict with the weight of authority as outlined in Point 4, supra (p. 19).*

The court below relied upon *Pufahl* v. *Estate of Elvira J. Parks, Deceased.* (1936) 299 U. S. 217, involving a claim for assessment against the estate of a deceased stockholder and an attempt to subject undistributed inventoried assets in the hands of the executors to its payment, said claim having been filed after the expiration of the one year period provided by Illinois law. The court below in the instant case appears to have rested its decision on language quoted from the *Pufahl* case and italicized this sentence as the basis of its conclusion (R. 15):

> "From the moment of the Comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law against a living stockholder, or the executor of a deceased stockholder."

The case did not involve the issue presented in the instant case concerning the distinction between the date of the assessment order and the date of payment of the assessment thereunder, and the language quoted in the opinion (R. 15) must be considered as dictum insofar as any supposed application to the instant case may be concerned. The purpose of this court in the *Pufahl* case in using the language above quoted, appears to have been only to indicate that the contingent assessment obligation of the shareholder became an absolute liability upon entry of the Comptroller's order for assessment. The statement that "From the moment of the Comptroller's order for assessment the bank's receiver" had a claim which would support an action of debt at common law does not seem, under the facts

and issues in the case, to have been intended to indicate that suit to enforce collection of an assessment could be filed at the moment of entry of the Comptroller's order for assessment, as distinguished from the date fixed for payment of the claim.

The court below also relied upon *Coffey* v. *Fisher*, (C. C. A. 6, 1938) 100 F. (2d) 51, to support its conclusion. There, the receiver's suit to enforce the statutory liability of the estate of a deceased stockholder raised the question of the applicable provisions of the Tennessee statute of limitations. The stockholder died on August 1, 1933, and was the owner of 500 shares of national bank stock, and the executor of his estate qualified on August 19, 1933. The Comptroller of the Currency levied an assessment against the shareholders of the bank on April 19, 1934, and by various extension dates the time for payment thereof was extended to April 15, 1935. The suit was filed on June 29, 1936. The executor contended that the action was barred by Section 8225 of the Tennessee Code of 1932, which provides that the period allowable before bar to suits by creditors of deceased persons is six months from the date the cause of action thereon accrues. Plaintiff-receiver contended that he was not a creditor of the deceased; and that because the assessment was not levied until after the death of the stockholder his claim was against the personal representative, and was governed by Section 8608 of said Code, which permits the cause of action to be commenced within eighteen months from the time it accrues.

The Court was of opinion that Section 8225 applied and that the suit was barred, no matter whether the cause accrued on the assessment levy date or on the last extension date for payment. However, because plaintiff-receiver insisted that he had eighteen months from April 15, 1935, within which to bring suit, the Court entered into a discussion of receiver's contention. The Court expressed the opinion that the receiver's right to sue existed as of the date of the levy of the assessment, notwithstanding the fact

that the assessment order provided for future dates of payment of the assessment, but held that even upon the receiver's contention his suit was barred. Such an assumption seems obvious error in that such doctrine nullifies that portion of an assessment order which fixes the future date of payment and thereby renders the stockholder subject to immediate suit notwithstanding the Comptroller provides that he is not required to pay before the specified future date. Inasmuch as Section 8225 had been applied by the court as a bar to the action, petitioner submits that the aforesaid portion of the court's opinion relating to the accrual date of the right to sue is no more than dictum in so far as the question here presented is concerned.

The court below makes a statement in its opinion (R. 14) that the case of *Armstrong* v. *McAdams* (C. C. A. 8, 1931) 46 F. (2d) 931, (therein cited) presented the identical question involved in the instant case. It is respectfully submitted that upon examination of the case it will be ascertained that the court was mistaken in this regard and that the issue presented in the instant case was not involved in that case. The case does involve the question of whether, under Arkansas law, the three year Statute of Limitations or the five year Statute of Limitations applied to the particular case, as explained more fully at footnote 1, *supra*, page 3.

The cases of: *Donald* v. *Bird* (C. C. A. 9, 1936) 85 F. (2d) 663; *Drain* v. *Stough* (C. C. A. 9, 1932) 61 F. (2d) 668; *Rankin* v. *Barton* (1905) 199 U. S. 228—relied upon by the court below (R. 16) appear to have no application to the issues of the instant case. They make no mention of a date for payment of the assessment and as a matter of fact the date for payment would have been wholly immaterial to the questions at issue in any of the three cases.

In *Johnson* v. *Greene*, (C. C. A. 9, 1937) 88 F. (2d) 683 (R. 16) cited by the court below, a California Statute of Limitations provided that the statute should run from the date the assessment liability was "created". The decision

properly held that the date of payment was immaterial under the statute. It is obvious the decision has no application to the issues of the instant case.

IX.

CONCLUSION.

In view of the foregoing discussion it is considered that the decision of the court below should be reversed.

Respectfully submitted,

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APPENDIX.

U. S. C. Title 12, Sec. 63.

The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association existing on June 22, 1874, under State laws, having not less than $5,000,000 of capital actually paid in, and a surplus of 20 per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of 20 per centum shall be kept undiminished, and be in addition to the surplus provided for in this chapter; and if at any time there is a deficiency in such surplus of 20 per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of this chapter relating to dissolution and receivership. (R. S. Sec. 5151; Dec. 23, 1913, c. 6, Sec. 23, 38 Stat. 273.)

U. S. C. Title 12, Sec. 64:

The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the

subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, Sec. 23, 38 Stat. 273.)

U. S. C. Title 12, Sec. 191.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192. (June 30, 1876, c. 156, sec. 1, 19 Stat. 63.)

U. S. C. Title 12, Sec. 192.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such associa-

tion ,on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings. * * * (R. S. sec. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, sec. 339, 49 Stat. 721.)

TREASURY DEPARTMENT

Office of the Comptroller of the Currency
Washington, July 25th, 1888

In the matter of
"The Commercial National Bank
of Dubuque." Iowa

To All Whom It May Concern:

Whereas, upon a proper accounting by the receiver heretofore appointed to collect the assets of "The Commercial National Bank of Dubuque," Iowa, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States:

Now, Therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said Commercial National Bank for One hundred thousand dollars to be paid by them ratably on or before the twenty fifth day of August, 1888; and I hereby make demand upon each and every one of them for One hundred dollars upon each and every share of the capital stock of said association held or owned by them respectively, at the time of its falure; and I hereby direct E. P. Welles, the receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to en-

fore to that extent the said individual liability of the said shareholders.

In Witness Whereof I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia this twenty fifth day of July, A. D. 1888.

SEAL

J. D. ABRAHAMS,
Deputy and Acting Comptroller of Currency.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 327.

A. F. RAWLINGS, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*,

v.

MRS. ELLA M. RAY, *Respondent*.

REPLY BRIEF ON BEHALF OF PETITIONER.

JOHN C. SHEFFIELD,
Attorney for Petitioner.

GEORGE P. BAKER,
LEE ROY STOVALL,
HARRIET BUCKINGHAM,
Attorneys for the Comptroller of the Currency,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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No. 327.

A. F. RAWLINGS, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*,

v.

MRS. ELLA M. RAY, *Respondent*.

REPLY BRIEF ON BEHALF OF PETITIONER.

I.

Comments Concerning "Arkansas Decisions" Cited on Page Five of Respondent's Brief.

On page 5 of respondent's brief are cited three Arkansas decisions in support of the doctrine that where a debt is payable on demand it is due immediately and consequently suit may be brought, and the statute of limitations begins to run, at once. We have no quarrel with this general principle, but, as respondent indicates, its application to the instant case is predicated upon the assumption that the petitioner's cause of action accrued on November 6, 1935,—the date the Comptroller levied the assessment. It is there-

fore submitted by petitioner that said cases have no bearing upon the issue here presented of whether the cause of action upon the assessment liability accrued on November 6, 1935, the date of levy, or on December 13, 1935, the date of payment fixed by the Comptroller in the order levying the assessment.

Incidentally, it may be noted that the reporter citation of one of the cases,—*Sturdivant, et al.* v. *McCorley,* is inadvertently given by respondent as 103 S. W. *132,* but the correct page citation is *732.* Respondent quotes, on page 5 of her brief, *the italicized portion only* of the following excerpt from the Court's opinion in that case:

> "As no time was set for the payment, the debt was in law payable on demand. But it does not follow, as counsel for appellee contends, that the statute of limitations did not commence to run until demand was made, for the courts generally hold that *a debt payable on demand is due immediately, so that an action can be brought at any time without any other demand than the suit, and the statute of limitation begins to run at once.*" (Italics inserted)

Attention is invited to the beginning of the quotation: **"As no time was set for the payment, * * *."** This portion of the quotation is of significance in its application to the instant case, in that by the assessment order of November 6, 1935 the "time was set for the payment" of the assessment on or before December 13, 1935. Hence, if the whole quotation from the foregoing case be considered the principle there indicated will support the position of petitioner rather than the position of respondent.

As indicated by the decisions cited on pages 9-10 of petitioner's main brief, the Arkansas doctrine is to the effect that a cause of action does not accrue, and the statute of limitations does not begin to run, until the right to file suit to enforce the cause of action has matured and is available.

On page 8 of petitioner's main brief, under numbered paragraph (2) thereof, decisions of this Court were cited to indicate that it is settled law in the Federal courts that statutes of limitation will not commence to run against a cause

of action until the right to enforce the same by institution of suit has accrued. To the cases there cited may be added: *United States ex rel. Louisville Cement Company* v. *Interstate Commerce Commission* (1918), 246 U. S. 638, 644.

As pointed out on page 9 of petitioner's brief, the decisions of the Federal courts, and the decisions of the Arkansas courts, appear to be in complete accord on this general doctrine.

II.

Reply to Argument of Respondent Concerning Long Standing Practice of Comptroller of Currency in Fixing a Future Date for Payment of Assessment.

On pages 11-12 of respondent's brief it is argued, in effect, that the Comptroller of the Currency is without authority to fix a future date for payment of the assessment and that the long standing practice of the Comptroller of the Currency in interpreting the national banking statutes providing for the assessment is not entitled to substantial weight in the construction of these statutes by the courts and in determining the issues involved in the instant case.

On page 12 of petitioner's brief, attention was invited to the fact that it had been the policy and practice of the Comptroller of the Currency since 1888 to incorporate in the order levying an assessment,—specific provisions fixing and prescribing a future date for the payment of the assessment, and the discussion of this practice appears in petitioner's brief, pages 12-18. The statutes creating and providing for the assessment (U. S. C. Title 12, Sec. 63, 64; appendix p. 24, petitioner's main brief) do not fix a time for the payment of the assessment, and from the very nature of things it is obvious that it would have been impracticable to have done so. However, it will be observed that by the Act of June 30, 1876, c. 156, sec. 1, 19 Stat. 63 (U. S. C. Title 12, Sec. 191) and by sec. 5234 R. S. (U. S. C. Title 12, Sec. 192); (appendix pp. 25, 26, petitioner's main brief), Congress did authorize the Comptroller of the Currency to

levy an assessment whenever, in his judgment, such assessment is necessary for the purpose of meeting the debts and obligations of a national banking association in receivership. It seems clear, therefore, that these statutes will not admit of any construction other than that the questions of whether an assessment will be levied at all, and when such assessments shall be paid, must be determined by the Comptroller of the Currency. That such has been the interpretation and construction of these statutes by this court, was indicated in the cases of *Kennedy* v. *Gibson* (1869), 8 Wall. 498, 505, and *Korbly* v. *Springfield Institution for Savings, et al.*, (1917), 245 U. S. 330, 333, cited and quoted on pages 16 and 17 of petitioner's brief. Additional cases to the same effect are:

Casey v. *Galli*, (1876) 94 U. S. 673, 677.
National Bank v. *Case*, (1878) 99 U. S. 628, 634.
United States v. *Knox*, (1880) 102 U. S. 422, 426.
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Forrest v. *Jack*, (1935) 294 U. S. 158, 162.

Also see, *Adams* v. *Nagle, et al.*, (1938) 303 U. S. 532, 539, 540.

As pointed out on pages 12-13 of petitioner's main brief, this practice of the Comptroller of the Currency in fixing a future date for payment of the assessment was expressly commented upon with approval by the United States Court of Appeals for the District of Columbia in *Strasburger* v. *Schram*, 68 App. D. C. 87, 89; 93 F. (2d) 246.

It has been stated by this Court from time to time that great weight may properly be given to the settled construction of a statute by the Executive Department charged with its administration, and that such construction should not be overturned unless clearly wrong or unless a different construction is plainly required. *Inland Waterways Corp.* v.

Young, (March 25, 1940) 309 U. S. 517, 524-5; *United States* v. *Jackson,* (1930) 280 U. S. 183, 193; *Heath* v. *Wallace,* (1891) 138 U. S. 573, 582; *Brewster* v. *Gage,* (1930) 280 U. S. 327, 336; *Corsicana National Bank of Corsicana* v. *Johnson,* (1919) 251 U. S. 68, 83; *United States* v. *Moore,* (1877) 95 U. S. 760, 763; *United States* v. *Johnston,* (1888) 124 U. S. 236, 253; *Brown* v. *United States,* (1885) 113 U. S. 568, 571; *United States* v. *Finnell,* (1902) 185 U. S. 236, 244.

The language of Mr. Justice Frankfurter in *Inland Waterways Corp.* v. *Young, supra,* (at page 524) is in point:

> "* * * a long continued practice pursued with the knowledge of the Comptroller of the Currency is more persuasive than considerations of abstract conflict between such a practice and purposes attributed to Congress."

The specific issue involved in the instant case, concerning the question of whether the statute of limitations of the particular state starts to run from the date of the order levying the assessment or from the date for payment fixed in said order, was considered in Dickinson Law Review, March, 1940, Vol. XLIV, No. 3 at pages 233-235. The article discussed the decision and opinion of *Reich* v. *Van Dyke,* (C. C. A. 3, 1939) 107 F. (2d) 682, (cited page 19, petitioner's main brief) wherein the Court held that the statute started to run from the date for payment fixed in the assessment order. The author pointed out that the precise issue involved in the *Reich* case (as in the instant case) was not presented in cases such as *Rankin* v. *Barton,* (1905) 199 U. S. 228, and *McDonald* v. *Thompson,* (1902) 184 U. S. 71, although those cases did decide that the statute of limitations does not begin to run in favor of stockholders until their respective liabilities have been determined through an assessment by the Comptroller.

Respondent, in her brief on page 10, refers to and quotes from page 232 of the opinion in *Rankin* v. *Barton, supra,* the language,—"In other words, the liability dates from the order of the Comptroller," and argues on page 11 of her brief, that the statute begins to run from November 6, 1935,

—the date of the order of the Comptroller. Respondent further quotes (respondent's brief, page 13) from *McDonald* v. *Thompson, supra*:

> "In such cases no debt becomes due to the receiver as such until a deficiency has been ascertained and an assessment made, when the statute begins to run." (p. 76 Opinion)

Petitioner submits, in accord with the view taken by the author in Dickinson Law Review, *supra*, said cases of *Rankin* v. *Barton* and *McDonald* v. *Thompson*, establish, in this connection, no more than that the statute of limitations cannot begin to run in favor of the stockholder *prior to* the levy of the assessment by the Comptroller of the Currency, or, restated, cannot begin to run until *after* the levy of the assessment. *This is not the same as holding that the statute begins to run from the date of the order levying the assessment.*

There is, however, language in the opinion (at page 72) of *McDonald* v. *Thompson, supra*, which, although perhaps *dictum*, seems to indicate that the Court did consider that the cause of action on the asssessment therein referred to accrued on the date the assessment was payable:

> "As the cause of action in this case accrued on July 10, 1893, when the assessment was made payable, * * *".

In *McClaine* v. *Rankin*, (1905) 197 U. S. 154, the question presented was which of two sections of the local statute of limitations controlled the time within which suit upon assessment liability of a shareholder of a national bank must be brought. The distinction between the date of assessment, and the date fixed for payment, was not in issue, and hence the language next quoted from the opinion must be considered *dictum*, but it is, nevertheless, perhaps significant as indicating the views of the Court with reference to the date of accrual of the cause of action. The Court said (opinion page 158):

"And as this action was commenced within three years, but not within two years, after the assessment became due and payable, the question is whether subdivision 3 of § 4800 applies."

III.

CONCLUSION.

The order of assessment converts the theretofore contingent liability into an absolute liability, but the entire order must be considered and construed in determining the effect thereof in so far as the running of the statute of limitations may be concerned. The portion of the order fixing the future date of payment must be given equal effect with that portion of the order actually levying the assessment. If it be concluded that the Comptroller has the authority to fix a future time for payment of the assessment, it would seem necessarily to follow that the situation is governed by the general doctrine previously discussed (*supra*, pp. 2-3, and petitioner's main brief, pages 8-10) that statutes of limitations will not commence to run against a cause of action until the right to enforce the same by institution of suit has accrued. Obviously, under such circumstances, the stockholder has the full period up to and including the future date fixed for payment by the order, and he cannot be sued until the expiration of such future date followed by default in payment. Hence the statute of limitations will not start to run until such default.

Respectfully submitted,

JOHN C. SHEFFIELD,
Attorney for Petitioner.

GEORGE P. BARSE,
LEE ROY STOVER,
HARRIET BUCKINGHAM,
Attorneys for the Comptroller of the Currency,

Of Counsel.

NOTICE AND MOTION TO SUBSTITUTE PARTY

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 327.

E. B. FUTRALL, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*,

versus

MRS. ELLA M. RAY, *Respondent.*

NOTICE AND MOTION TO SUBSTITUTE PARTY.

GEORGE P. BARSE,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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versus

MRS. ELLA M. RAY, *Respondent*.

To:

C. E. DAGGETT,
J. B. DAGGETT,
Marianna, Arkansas,
Counsel for Respondent.

Sir:

PLEASE TAKE NOTICE that on October 7, 1940, or as soon thereafter as counsel can be heard, the within motion to substitute A. F. Rawlings, Receiver of the Lee County National Bank of Marianna, Arkansas, as Petitioner herein, as successor to and in the place and stead of E. B. Futrall, Receiver of the Lee County National Bank of Marianna, will be submitted to the Supreme Court of the United States.

A copy of the motion to substitute is served upon you herewith.

GEORGE P. BARSE,
Room 309 Treasury Building, Washington, D. C.,
Counsel for Petitioner.

Due and timely service accepted
this day of August, 1940.

.....

.....

Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 327.

E. B. FUTRALL, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*,

versus

MRS. ELLA M. RAY, *Respondent*.

MOTION TO SUBSTITUTE PARTY.

COMES Now, the petitioner in the above entitled cause, and moves that A. F. Rawlings, Receiver of the Lee County National Bank, Marianna, Arkansas, be substituted as petitioner therein in the place and stead of E. B. Futrall, former Receiver of the Lee County National Bank, Marianna, Arkansas, and in support of this motion makes the following brief statement of the matter involved, and the reasons relied upon for the substitution:

I.

This application is made under and pursuant to section 780 of Title 28 U. S. C. (Act of Feb. 13, 1925, c. 229, sec. 11, 43 Stat. 941).

II.

On August 12, 1940, E. B. Futrall, Receiver of the Lee County National Bank, Marianna, Arkansas, by direction of the Comptroller of the Currency, filed in this Court a petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit entered on May 13, 1940. This petition is now pending in this Court.

III.

E. B. Futrall resigned as Receiver of the Lee County National Bank, Marianna, Arkansas, on February 29, 1940, and A. F. Rawlings was appointed as successor Receiver, effective as of the close of business on February 29, 1940, by the Comptroller of the Currency, under the authority contained in sections 191 and 192 of Title 12 U. S. C. (Act of June 30; 1876, c. 156, sec. 1, 19 Stat. 63; sec. 5234 of the Revised Statutes).

IV.

As of the close of business on February 29, 1940, A. F. Rawlings, by virtue of his appointment by the Comptroller of the Currency, assumed and is now performing all of the duties of Receiver of the Lee County National Bank of Marianna, Arkansas, and is the successor in office of E. B. Futrall.

V.

There is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved therein. Under the provisions contained in Sections 63, 64, 191 and 192 of Title 12 U. S. C., A. F. Rawlings, as successor Receiver, is required to collect the assessment levied against the stockholders of the Lee County National Bank of Marianna, Arkansas, and the resignation of E. B. Futrall, as Receiver, in no way renders the issues involved in this cause academic, and has in no way relieved the necessity for a decision by this Court upon the issues involved therein.

VI.

The said A. F. Rawlings has been advised of the making of this motion and has consented thereto.

VII.

Less than six months have expired since the effective date of the resignation of E. B. Futrall.

WHEREFORE, the petitioner prays that A. F. Rawlings, Receiver of the Lee County National Bank of Marianna, Arkansas, be substituted herein as petitioner in the place and stead of E. B. Futrall, former Receiver of the Lee County National Bank of Marianna, Arkansas, and that A. F. Rawlings, as Receiver of the Lee County National Bank of Marianna, Arkansas, be permitted to continue and maintain this cause; and that the title of the cause be amended to read:

"A. F. Rawlings, Receiver of the Lee County National Bank, Marianna, Arkansas, Petitioner,

versus

Mrs. Ella M. Ray, Respondent."

Respectfully submitted,

GEORGE P. BARSE,
Counsel for Petitioner.

Dated: August 17, 1940.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 327.

A. F. RAWLINGS, RECEIVER OF THE LEE COUNTY NATIONAL BANK, MARIANNA, ARKANSAS, Petitioner,

vs.

MRS. ELLA M. RAY, Respondent.

BRIEF ON BEHALF OF RESPONDENT.

EARL KING,
Attorney for Respondent.

DAGGETT & DAGGETT,
C. E. DAGGETT,
J. B. DAGGETT,
Of Counsel.

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IN THE

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A. F. RAWLINGS, RECEIVER OF THE LEE COUNTY NATIONAL BANK, MARIANNA, ARKANSAS, Petitioner,

vs.

MRS. ELLA M. RAY, Respondent.

BRIEF ON BEHALF OF RESPONDENT.

I.

OPINIONS OF COURTS BELOW.

The judgment of the District Court and the opinion of the Circuit Court of Appeals are properly in the record, pages 8, 13 to 16.

II.

JURISDICTION.

That jurisdiction exists in this Court is admitted.

III.

SUMMARY STATEMENT.

The facts are correctly stated in petitioner's brief.

IV.

SPECIFICATION OF ERRORS.

Petitioner's brief properly states the errors for review.

V.

THE SOLE AND ONLY QUESTION PRESENTED IN THIS CASE IS:

(a) Does the three year statute of limitations of the State of Arkansas begin to run from the date the comptroller levied the assessment, or,

(b) From the date of payment thereof as fixed by the comptroller? If (a) applies then the cause of action is barred. If (b) applies then the complaint was filed within the statutory period.

VI.

STATUTES INVOLVED.

Petitioner's brief correctly states the statutes involved herein.

VII.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

We must take issue with petitioner here.

(a) It is admitted that the ruling of the Circuit Court of Appeals in the instant case conflicts with the decisions of other Courts of Appeal, but we ask the Court to bear

in mind that a decision in this case would be applicable only to cases arising within the State of Arkansas for the reason that the Arkansas statute of limitations is applicable and the decision herein would not be authority in a case involving the construction of statutes of limitation of other states.

(b) The question presented in the instant case is purely local. This Court should take judicial knowledge of the fact that the bank involved in this litigation is the only national bank in the State of Arkansas now in process of liquidation. Moreover, liability imposed under the statute under consideration herein has been removed by the act of June 16, 1933, Chapter 89, Sec. 22, from which we quote as follows:

> "The additional liability imposed upon shareholders in national banking associations by the provisions of sections 63 and 64 of this title shall not apply with respect to shares in any such association issued after June 16, 1933. Such additional liability shall cease on July 1, 1937, with respect to all shares issued by any association which shall be transacting the business of banking on July 1, 1937."
> See U. S. C. A. Title 12, Section 64a.

Therefore, a decision in this case will have no application whatever in the administration of the affairs of other banks.

(c) The decision of this Court in the instant case does not involve an important question of law for the reasons stated in Paragraph (b). Furthermore, the question involved in this case has been definitely settled by this Court in the case of Pufahl v. Estate of Parks (1936), 299 U. S. 217.

VIII.

SUMMARY OF ARGUMENT.

The right to institute the suit herein arose and the cause of action under the Arkansas Statute of Limitations accrued November 6, 1935, the date the comptroller levied the assessment. Suit was filed December 7, 1938. Therefore, the cause of action against respondent was barred by the Arkansas three year Statute of Limitations.

(1) The character of the assessment liability is measured by the Federal Statute.

(2) The law of the State of Arkansas fixes the time at which the Statute of Limitations will commence to run.

(3) The Federal Statute creates, to quote the language of this Court in Pufahl vs. Estate of Parks, 299 U. S. 217, 57 Sup. Ct. Rep. 151:

> "From the moment of the comptroller's order for assessment, the bank's receiver has a claim which would support an action of debt at common law against a living stockholder."

In other words, a debt "due on demand" and under the laws of Arkansas as hereinafter cited the Statute of Limitations begins to run against such a claim from the date of its making.

(4) We contend that the ruling of the Court below is in accord with the previous decisions of this Court.

ARKANSAS DECISIONS.

If, as is shown by the cases cited above, and by those cited by the petitioner as well, the liability created by the Federal Statute is "due on demand," then this case is ruled by the decision of the Supreme Court of Arkansas in the case of Sturdivant vs. McCorley, 83 Ark., page 278, 103 S. W. 132:

> "A debt payable on demand is due immediately, so that an action can be brought at any time without any other demand, then the suit and the Statute of Limitations begins to run at once."

To the same effect are Kempner vs. Gans, 87 Ark. 221, 111 S. W. 1123, and McCollums vs. Neimeyer, 142 Ark. 471, 219 S. W. 746.

IX.

ARGUMENT.

The right to institute this suit arose and the cause of action accrued on November 6, 1935, the date the comptroller made the assessment. Suit was not filed until December 7, 1938, more than three years after the date the assessment was levied by the comptroller; therefore the cause of action is barred by the Arkansas three year statute of limitations.

In support of the above propositions we desire to present to this Court the following statements of law, to-wit:

(1) The character of the liability must be measured by the language of the Federal Statute.

(2) Such liability must be enforced according to the laws of the State of Arkansas.

(3) The liability is one due and payable "on demand" and the right to sue upon such a cause of action in the State of Arkansas begins to run upon its making. Therefore, the cause of action in the instant case was barred when the complaint in the instant suit was filed.

Petitioner cites the opinion of this Court in Forrest vs. Jack (1935), 294 U. S. 158-172. We dismiss any further reference to this case by the following quotation from the opinion:

> "No cause of action arises until the assessment is made by the comptroller and so far as concerns the need and amount, his findings are conclusive."

The opinion of the Court cites numerous cases from this Court, many of which are cited by petitioner in support of their position herein, but all of the cases bear out the above fundamental statement of the law and if such holding be adhered to in the instant case it necessarily follows that the decision of the lower Court herein should be affirmed. That such is a proper interpretation of the opinion is further supported by the opinion of this Court in the case of Pufahl vs. Parks Estate, 299 U. S. 217 (Dec. 7, 1936), from which we quote:

> "From the moment of the comptroller's order for assessment the bank's receiver has a claim which would support an action of debt in common law against a living stockholder."

Strasberger vs. Schram (Nov. 23, 1937), 93 F. (2), page 246, was a case arising in the District of Columbia brought by Schram, the receiver of the First National Bank of Detroit, a Michigan bank, against Strasberger, a resident of the District of Columbia, to collect an assessment

on the capital stock of the bank owned by Strasberger. Receiver appointed May 11, 1933. Comptroller levied assessment May 16th payable on or before the 23rd day of June, 1933, which date of payment was extended to July 31st, 1933. Strasberger filed motion to dismiss September 25, 1936, pleading the Statute of Limitations, and this is the only question submitted to the Court. We quote from the opinion as follows:

> "It is also agreed that the applicable statute is that of the District of Columbia so that the case as presented involves the single question whether the cause of action accrued upon the declaration by the comptroller of the deficiency or whether it accrued on the final date set by the comptroller for payment."

The position of the appellant was that the cause of action accrued on the date the comptroller declared the deficiency and fixed the amount to be paid by the shareholders. The position of the receiver was that the right to maintain the action did not accrue until the final date set by the comptroller for payment of the assessment. The suit was filed July 22, 1936. The date of the assessment was May 16, 1933. Therefore, if the cause of action accrued at the date of the comptroller's assessment then the action was barred. If it accrued at the date of the payment fixed by the comptroller, then the statute had not run. The Court then reviews the case of McDonald vs. Thompson, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. 437, in which the assessment was made June 10, 1893, and the date of payment fixed on July 10, 1893. Suit by the receiver was brought in May, 1898. The Court, in the opinion in the McDonald case, uses the following language:

> "As the cause of action in this case accrued on July 10, 1893, when the assessment was made payable and the action was begun on June 20, 1898, more than four, but less than five years thereafter, the case really turns upon the question whether the action is upon a 'contract or promise in writing' or 'upon a contract not in writing express or implied' or 'upon a liability created by statute'."

The Court in the Strasberger case does not rest its opinion upon the language of this Court above quoted, for they say, further:

> "It is apparent that it was wholly immaterial in that case whether the cause of action accrued on June 10, or July 10, since the court was dealing in years and not days."

However, the Court in this opinion does use this language:

> "That principle is, we believe, that until an unconditional liability to pay something is fastened on a debtor no action can be maintained against him and the statute of limitations does not begin to run in his favor,"

and cites Scovill vs. Thayer, 195 U. S. 143, in support of its statement.

An analysis of the opinion of this Court in Scovill v. Thayer clearly discloses that the opinion does not apply to the facts in the case at bar. Scovill vs. Thayer was a suit by the receiver of an insolvent business corporation organized under the laws of the State of Kansas. The corporation was adjudicated bankrupt on an insolvency petition, and the assignee brought suit against the stockholders to recover their unpaid stock subscriptions. The

question in that case was whether or not the Statute of Limitations began to run from the date the Court rendered its decree ordering the assessment or from the date of the bankruptcy of the corporation. No question of the National Bank statute is involved whatever, and in fact, no federal statute of any kind was under consideration by the Court in that case. When these cases are analyzed it will be clearly seen that no case from this Court has been cited by the Court in Strasberger vs. Schram upholding its opinion. It is noted here also that this opinion makes us reference to the case of Pufahl vs. Parks Estate from this Court.

The Court also cites Thompson vs. German Insurance Company, November 24, 1896, 76 Fed. 892.

A study of this opinion shows that nothing therein is authority for the position taken in the Strasberger case. The findings of the Court in that case may be briefly stated as follows:

1. The Circuit Court has jurisdiction.

2. The Statute of Limitations can bar an action on a stock assessment.

3. The statute applies in equity as well as at law.

4. "The act of the comptroller in making the assessment created a right of action against the stockholders, but it was not the institution of a suit for the enforcement of the right of action that is called into being . . . as soon as this right of action accrued to the receivers the statute of limitations began to run in favor of the stockholders, and the full period to complete the bar had terminated before this suit was brought."

If, as this opinion states, "The act of the comptroller in making the assessment created a right of action against the stockholders" then under the applicable statute of the State of Arkansas, the statute begins to run and no power exists in the comptroller to rule otherwise.

Moreover: The facts here were: The assessment was made July 13, 1892, payable August 3, 1893. "The bill was filed on the fifth day of October, 1896, more than four years after the assessment was made, and after the amount thereof was determined to be due and payable."

Rankin v. Miller, 207 Fed. 602 (District Court). Suit by Rankin as Receiver First National Bank of Alma, Kansas, against Executors of Robert H. Miller. The same litigation was before the District Court in the cases of Hamner v. Miller, 263 Fed. 956, and Rankin v. Miller, 266 Fed. 236. The lower Court overruled the plea of the statute of limitations and on appeal under the style of Miller v. Hamner, 269 Fed. 891, the Circuit Court of Appeals (3d Circuit) reversed and held that the statute of limitations barred the action.

In Rankin v. Barton, 199 U. S. 228, 26 Sup. Ct. Rep. 29, the second assessment was levied November 20, 1900. Plea of Statute of Limitations sustained by the State Court. The Court says:

> "The individual liability of a stockholder can only be enforced by his (Comptroller's) order. The provisions are as much for the benefit of the stockholder as for the United States and it is indispensable to the beginning of a suit against the stockholder. In other words, the liability dates from the order of the Comptroller."

We think we would be perfectly logical to state here that the words "from the order of the Comptroller" mean that the statute begins to run on the date of the order of the Comptroller (in the case at bar November 6, 1935).

Hall v. Ballard, 90 Fed. (2) 939, Bank in voluntary liquidation, not upon order of the Comptroller. Receiver appointed by and acting under Court order. The statute of limitations not set in motion until order of Court declaring insolvency and levying assessment. We quote from the opinion:

> "Therefore, the cause of action against appellee here never accrued until July 7, 1934, the date upon which the U. S. District Court for the Western Division of Virginia first ascertained the necessity and ordered the payment of 100% of the par value of the stock."

The same statements apply to the case of King v. Pomeroy, 121 Fed. 286-292, 58 C.C.A. 209. We quote:

> "The liability of the shareholders of the bank does not become due, does not mature, and the action to collect it does not accrue, until the court decides that it is necessary to collect some part of it, determine the amount and fixes the time for its payment."

In these cases, if the Court will substitute the action of the Comptroller in levying the assessment for the decree of the Court, they become authority supporting the decision of the lower Court herein.

Moreover, the learned justice who wrote the opinion in the Strasberger case lays great stress on the practice of the comptroller in levying the assessment and fixing

a later date for its payment. Reliance on such practice according to all the decisions of this Court is warranted only when doubt or ambiguity exists in the language of the statute. Such is not the case here. No effort was made by Congress to fix the date of payment of the assessment. The statute fixes the liability only and the statute of limitations of the state then begins to operate and the action of the Comptroller if approved would give to him power as was pointed out in the case of Coffey v. Fisher (hereinafter quoted) to suspend or forever annul the statute of a sovereign state. The mere statement of the proposition itself shows the fallacy of such argument. The facts in the case at bar makes applicable the following quotation from the case of Texas and Pacific Railway Company v. U. S., 289 U. S. 627, 53 Sup. Ct. 768:

> "Interpretation of act by statutory body plainly not granted such power is not binding in the courts."

Also, the learned justice attempts to distinguish the case from the case of Johnson v. Green (C.C.A. 9th Mar. 1, 1937 hereinafter cited), by drawing a distinction between the language of the California statute "Within three years after . . . the liability was created" as opposed to the language of the District of Columbia statute, which reads: "After three years from the time when the right to maintain such action shall have accrued."

We submit that this is a distinction without a difference. To say that the state statute of limitation has anything to do with "Creating" the liability is extremely illogical. The federal statute "creates" the right and fixes its character and same cannot be modified or changed by the state statute and if the obligation created

by the federal statute is one due "on demand" (as all the cases hold) it becomes wholly immaterial when the liability is "created" or "accrues." The Twentieth Century Dictionary defines the word "creates" as "to produce; to bring into being from nothing; to cause to exist" and the word "accrue" is defined as "to proceed, or come; to be added."

We call the Court's attention to the following authorities in support of the decision of the lower Court herein:

Michie on Banks & Banking, Vol. 7, page 110, Sec. 116:

> "Since the statutory liability of shareholders in a National Bank is conditional the statute of limitations does not commence to run until after the assessment has been made by the Comptroller of the currency."

The author cites McDonald v. Thompson, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. 437.

Petitioner quotes from this case certain language which might be construed as favorable to his contention; likewise we say that the following language, from the same opinion, bears out our contention:

> "In such cases (insolvency under Sec. 5234) no debt becomes due to the receiver, as such, until a deficiency has been ascertained and an assessment made, when the statute begins to run."

The author also cites McClain v. Rankin, 197 U. S. 154, 25 Sup. Ct. 410, from which petitioner quotes. We also indulge ourselves in a quotation from the same case (page 413) as follows:

"In Carrol v. Green it was said: 'According to the statute, the liability of each stockholder arose upon the failure of the bank. The liability gave at once the right to sue; and, by necessary consequences, the period of limitation began at the same time. But here (as in the case at bar) the right to sue did not obtain until the Comptroller of the Currency had acted, and his order was the basis of the suit. The statute of limitation did not commence to run, **until assessment made**, and then it ran as against an action to enforce the statutory liability, and not an action for breach of contract.'"

So far as we are able to ascertain the question presented here was first presented to the Courts in the case of Armstrong vs. McAdams (Jan. 5, 1931—8th) 46 Fed. (2) page 931. Two questions were presented to the Court in that case:

(1) When does the statute begin to run?

(2) Does the three year or the five year Arkansas Statute apply?

The Court held that the five year statute applied. Afterwards however the same question was presented to the Supreme Court of Arkansas in the case of Vandover vs. Lumber Underwriters et al., 126 S.W. (2) 105, and that Court held that the three year statute governed such liabilities. Thereupon in the case of Futrall vs. Branson, 104 Fed. (2) 409, the Circuit Court of Appeals for the Eighth Circuit reversed its holdings in Armstrong vs. McAdams and followed the decision of the Supreme Court of Arkansas in the Vandover case. We quote from the opinion in the McAdams case:

"The cause of action accrued August 10, 1926, the date the assessment was made by the comptroller of the currency."

It is not clear from the above statement whether August 10 was the date the assessment was made payable or the date it was levied by the comptroller. At the hearing in the Court below the original record was examined and it was found that August 10th was the date the assessment was levied and not the date fixed for its payment.

See opinion of lower Court (R. page 14).

In Drain v. Stough, (9th) 61 Fed. (2) page 668 (March 7, 1932), the Circuit Court of Appeals for the Ninth Circuit says:

"The date of the assessment is the date upon which the liability of the stockholder to the receiver accrues and not until the assessment is made and then only does the statute of limitations begin to run."

It is worthy of note here that the Court cites as authority for the above statement the cases of Scovill v. Thayer, Supra, and McDonald v. Thompson, Supra, both of which are cited in the Strasberger case in support of an entirely different statement of the law.

In Donald v. Byrd, (9th) 85 Fed. (2) 663 (Sept. 8, 1936):

"As regards running of limitations, causes of action accrued against stockholders of national banking association when assessments are made by comptroller of the currency."

This opinion in support of its statement cites practically all the cases cited in petitioner's brief and reviews many of the authorities.

In Pufahl vs. Parks Estate, 299 U. S. page 175 (December 7, 1936), this Court establishes the character of the claim of the comptroller, the date of its accrual or, if the petitioner herein deems it better language, the date of its creation, in the following language:

> "From the moment of the comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law against a living stockholder."

The opinion is quite lengthy, the statute of limitations of the State of Illinois was involved, and the principles laid down therein had served to clarify many conflicting decisions of the various lower courts, and to quote the opinion of Judge Gardner in the case at bar the "question has been definitely put to test by the decision of the Supreme Court." (R. page 15.) It is worthy of note here that in the Strasberger case no reference is made to this opinion.

Johnson v. Greene, (9th) 88 Fed. (2) 683 (Mar. 1, 1937), action to recover statutory assessment against national bank stockholders brought more than three years after date of assessment but less than three years after date when assessment was payable were barred by the California statute requiring bringing of actions on statutory liability within three years after creation thereof.

In Coffey v. Fisher, (6th) 100 Fed. (2) 51 (Nov. 16, 1938), the Circuit Court of Appeals for the Sixth Circuit, the syllabus is as follows:

> "The right of action to enforce statutory liability of national bank stockholder accrued . . . **when assessment was made**, rather than on last extension date allowed by Comptroller for payment, and the statute was not tolled by extensions of time for payment."

In this case the Court reviews the decisions of this Court, other Appellate Courts and states the law as follows:

> "Plaintiff insists that his cause of action accrued on April 15, 1938, the last extension date allowed by the comptroller and upon the theory that Section 8608 is applicable he had 18 months thereafter within which to sue. We recognize that there are decisions supporting his contention but the last pronouncement of the Supreme Court is to the contrary."

In Pufahl v. Estate of Parks, Supra, the Court said:

> "The contingent obligation to pay an assessment is rendered absolute by the comptroller's action in ordering one . . . from the moment of the comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law against a living stockholder."

X.

CONCLUSION.

In view of the foregoing, we submit the following proposition as the law of the case:

(a) The question herein is one of local law, can never arise again, because of the change in the federal statute under consideration and the writ of certiorari should be dismissed as improvidently granted.

(b) The statute creates a liability on the stockholder for the par value of his stock, contingent on the insolvency of the bank, and when such contingency arises, the liability becomes absolute, payable "on demand." In other words, the statute creates a "demand liability."

(c) The liability must be enforced according to the laws of the State of Arkansas; and under the Arkansas statute of limitations and the decisions of the Supreme Court of Arkansas, the cause of action was barred when the complaint was filed.

(d) The decision of the lower Court is in complete accord with prior decisions of this Court.

The decision of the lower Court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 327.—October Term, 1940.

A. F. Rawlings, Receiver of the Lee County National Bank, Marianna, Arkansas, Petitioner,
vs.
Mrs. Ella M. Ray.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 3, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner is the receiver of the Lee County National Bank of Marianna, Arkansas, which in 1933 was declared by the Comptroller of the Currency to be insolvent. On November 6, 1935, the Comptroller assessed its shareholders fifty per centum of the par value of their shares. The assessment was required to be paid on or before December 13, 1935, and the receiver gave notice accordingly. As respondent failed to pay, the receiver brought suit on December 7, 1938, in the District Court of the United States for the Eastern District of Arkansas to recover the amount assessed. Respondent pleaded the Arkansas statute of limitations which provides that such an action must be commenced "within three years after the cause of action shall accrue". Pope's Digest of Statutes of Arkansas (1937), Sec. 8928. The District Court sustained the plea and its judgment was affirmed by the Circuit Court of Appeals. 111 F. (2d) 695. Because of a conflict of decisions we granted certiorari. See *Strasburger* v. *Schram*, Ct. App. D. C., 93 F. (2d) 246; *Reich* v. *Van Dyke*, C. C. A. 3d, 107 F. (2d) 682; *Haight* v. *First Trust & Deposit Co.*, C. C. A. 2d, 112 F. (2d) 572; *MacPherson* v. *Schram*, C. C. A. 5th, 112 F. (2d) 674.

The state statute of limitations is applicable. *McDonald* v. *Thompson*, 184 U. S. 71, 72; *McClaine* v. *Rankin*, 197 U. S. 154, 158. The question is whether the statute began to run on the date of the assessment, as held by the court below, or on the date fixed for payment. The words "after the cause of action shall accrue" in the Arkansas statute have their usual meaning and refer to "a com-

plete and present cause of action". *Holloway* v. *Morris,* 182 Ark. 1096, 1099.

The question as to the time when there was a complete and present cause of action so that the receiver could enforce by suit the liability imposed by the Comptroller's assessment is a federal question and turns upon the construction of the assessment and the authority of the Comptroller to make it under the applicable federal legislation.

While the assessment was made on November 6, 1935, it was expressly made payable on or before December 13, 1935. Respondent was allowed until that date to pay and prior thereto suit could not be maintained against him. Hence the statute of limitations did not begin to run until December 13, 1935, and the suit was in time.

The case of *Pufahl* v. *Estate of Parks,* 299 U. S. 217 (upon which the court below relied) is not to the contrary. The question now presented was not there involved. In that case, after the death of a stockholder of a national bank, and after the expiration of one year from the date of letters testamentary, the Comptroller of the Currency made an assessment upon the decedent's estate. The state court, applying a state statute, had disallowed the receiver's claim upon the assessment as against undistributed assets in the hands of the executors, which had been inventoried within a year from the date of letters testamentary, because the claim did not accrue and was not presented to the probate court within that period, but allowed the claim as to assets not inventoried within the year. We affirmed the judgment. We said that where an assessment had been made in the decedent's lifetime an accrued and provable debt existed against his estate, and that if the assessment were made after his death a claim against the funds and assets of the estate accrued as of the date of the assessment. Further, that the claim of the receiver, although based upon a federal statute, could be enforced only in conformity with the law of the forum governing the recovery of debts of like nature (*Id., pp.* 224, 225) and that the non-discriminatory legislation of Illinois where the suit was brought was controlling. We observed that the contingent obligation of a stockholder to pay an assessment was rendered absolute by the Comptroller's action in ordering one and that from the moment of the order of assessment the receiver had a claim which would support an action at common law against a living